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The California State Courts and Consumer Class Actions for Antitrust Violations

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The California State Courts and Consumer Class Actions for Antitrust Violations

Federal antitrust laws and class action procedures restrict recovery by classes of consumer plaintiffs for antitrust violations. In contrast, California antitrust laws and class action procedures permit recovery for similar violations of California antitrust laws. As a result of these differences, many class actions have been filed in California courts to recover for violations of the California antitrust law, the Cartwright Act.[1] Several of these actions concern the same activities that are the subject of antitrust suits alleging violations of the Sherman Act,[2] filed in federal courts.[3] Because parallel state and federal antitrust suits often are brought by different classes of plaintiffs, the possibility of multiple liability for the same anticompetitive acts arises.

Without attempting to provide an exhaustive analysis of either federal or California antitrust laws, this Comment sets forth several important differences between federal and California antitrust remedies. First, the Comment contrasts the federal and California antitrust laws relating to the recovery of damages by indirect purchasers. Under federal law, consumers who have not purchased directly from an antitrust violator usually will be denied recovery. Under the Cartwright Act, however, such an indirect purchaser commonly will be permitted to

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1. CAL. BUS. & PROF. CODE §§ 16700-16760 (West 1976 & Supp. 1981).

2. 15 U.S.C. §§ 1-7 (1976).

3. Several antitrust actions involving allegations of antitrust violations similar to those in concurrent federal actions have been filed in California state courts. *E.g.*, *In re* Sugar Antitrust Litigation, 588 F.2d 1270 (9th Cir. 1978); Pate v. Boise Cascade Corp., No. 765742 (Super. Ct. City & County of San Francisco, filed April 16, 1980) (related to *In re* Fine Paper Antitrust Litigation, 446 F. Supp. 759 (J.P.M.L. 1978) (consolidated in E.D. Pa.)); Goldberg v. CPC International, No. 765217 (Super. Ct. City & County of San Francisco, filed March 31, 1980) (related to *In re* Corn Derivatives Antitrust Litigation, 486 F. Supp. 929 (J.P.M.L. 1980) (consolidated in D.N.J.)); Esprit De Corp. v. Alton Box Board Co., No. 750975 (Super. Ct. City & County of San Francisco, filed March 22, 1979) (related to *In re* Corrugated Container Antitrust Litigation, 441 F. Supp. 921 (J.P.M.L. 1977) (consolidated in S.D. Tex.)); Greenberg v. Leviton Mfg. Co., No. 759734 (Super. Ct. City & County of San Francisco, filed Oct. 30, 1979) (related to *In re* Wiring Device Antitrust Litigation, 444 F. Supp. 1348 (J.P.M.L. 1977) (consolidated in E.D.N.Y.)). Recently, in suits alleging vertical price-fixing, which arguably may involve direct purchasers, several actions in California, Louie v. Cuisinarts, Inc., No. 881943 (Super. Ct. City & County of San Francisco, filed Oct. 1, 1980), Reynolds v. Cuisinarts, Inc., No. 771845 (Super. Ct. City & County of San Francisco, filed Sept. 29, 1980) and Gayer v. Cuisinarts, Inc., No. 458970 (Super. Ct. San Diego County, filed Sept. 23, 1980) (removed to federal court, see note 124 *infra*), relate to federal actions consolidated as *In re* Cuisinart Food Processor Antitrust Litigation, 506 F. Supp. 651 (J.P.M.L. 1981) (consolidated in D. Conn.).

recover damages for antitrust violations. Second, the Comment contrasts three critical aspects of federal and state class action procedure as they relate to large classes of consumers: the requirement of notice to members of a prospective class, the extent to which defendants can be ordered to bear the costs of notice, and the use of fluid recovery by class plaintiffs to make the distribution of damages awarded in a class action manageable. Although federal law discourages the certification of large consumer classes, California state courts are relatively liberal in certifying them.

Finally, this Comment discusses two problems arising from the increased use of California courts for redress of injury from antitrust violations. The first problem is procedural. The second problem has constitutional dimensions.

The first problem arises when a defendant seeks to remove state court class actions, based upon the Cartwright Act, to federal court on the grounds that the state actions present a federal question. Although the Ninth Circuit has held that a state suit filed by indirect purchasers cannot be removed on federal question grounds,[4] a recent United States Supreme Court decision suggests that an antitrust suit filed in state court under state antitrust laws by direct purchasers can be removed on federal question grounds.[5]

The second problem arises because federal law denies recovery to most indirect purchasers, while California law allows them to recover. Because of the danger of multiple liability for the same conduct, defendants argue that the California Cartwright Act's remedy for indirect purchasers is preempted by the federal antitrust law, which denies recovery. This Comment, however, suggests that this preemption analysis is premature. The state courts may reconcile the two antitrust schemes and prevent multiple treble damage recovery by offsetting the state court award in appropriate cases.

The Consumer's Right to Recover Damages in Antitrust Actions

Consumers who have directly purchased an item whose price has been increased as a result of an antitrust violation have an unquestionable right to recover damages under section 4 of the Clayton Act.[6] In *Illinois Brick Co. v. Illinois*,[7] however, the United States Supreme Court held that the Clayton Act does not permit recovery by most consumers who do not purchase the object of the antitrust violation di-

4. *In re* Sugar Antitrust Litigation, 588 F.2d 1270, 1272-73 (9th Cir. 1978).
5. Federated Dep't Stores v. Moitie, 101 S. Ct. 2424 (1981).
6. 15 U.S.C. § 15 (1976); *see* Reiter v. Sonotone Corp., 442 U.S. 330 (1979).
7. 431 U.S. 720 (1977).

rectly from the antitrust violators. For example, in an industry in which goods are sold by manufacturers to wholesalers, who in turn sell to retailers, a consumer who purchased from the retailer ordinarily could not recover damages for an antitrust violation unless the retailer committed the violation. If an unlawful antitrust conspiracy existed among manufacturers, or between manufacturers and wholesalers, which results in an increased price to the consumer, the consumer cannot recover from the manufacturers or wholesalers. In addition, the consumer cannot sue the retailer for passing on all or part of the price increase, unless the retailer itself committed antitrust violations. Federal law generally permits only the direct purchaser to recover damages, and the measure of the direct purchaser's recovery is the total overcharge[8] attributable to the antitrust violation, regardless of whether the direct purchaser absorbed the overcharge, thereby suffering diminution of profits, or passed the overcharge along to indirect purchaser customers.[9]

The *Illinois Brick* decision was based on *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[10] in which the Supreme Court refused to allow the defendant to offer proof in an antitrust damages action that the plaintiff had passed the illegal overcharges along to its customers.[11] The Court stated that the economic evidence required to prove that an overcharge had been passed on to indirect purchasers would be "virtually unascertainable."[12] The Court reasoned that, if the pass-on defense were allowed, "[t]reble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories."[13] Thus, rather than burden federal plaintiffs and the federal courts with a procedural morass of elaborate economic evidence, the Court refused to allow the defendants to contest the fact of injury on the grounds that the plaintiff passed the antitrust overcharge along to indirect purchasers. The Court also reasoned that private enforcement of the antitrust laws would be encouraged by precluding the pass-on defense, because direct purchasers, rather than ultimate consumers, have a greater interest in bringing suit.[14]

8. An overcharge is defined as that portion of the purchase price that results from the antitrust violation. *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968).

9. *See* Illinois Brick Co. v. Illinois, 431 U.S. at 728. In *Illinois Brick*, the Court indicated that indirect purchasers could recover damages when market forces had superceded the effect of their indirect purchaser status, for example, by cost-plus contracts or control situations. 431 U.S. at 736 n.16. *See, e.g., In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 497 F. Supp. 218, 226-27 (C.D. Cal. 1980).

10. 392 U.S. 481 (1968).

11. *Id.* at 494.

12. *Id.* at 493.

13. *Id.*

14. *See id.* at 494.

The Supreme Court was faced with a corollary problem in *Illinois Brick*. The plaintiffs purchased buildings that had been constructed with defendants' cement blocks and alleged that a price-fixing conspiracy among cement block manufacturers had caused the buildings to be overpriced by three million dollars.[15] The plaintiffs were denied recovery because they were only indirect purchasers of the products upon which prices allegedly had been fixed. In reaching this conclusion, the Court relied upon the two reasons enunciated in *Hanover Shoe*: proof of passed-on injury is too complex and speculative,[16] and assuring direct purchasers of a full recovery encourages private enforcement of the antitrust laws.[17]

The plaintiffs suggested that the *Hanover Shoe* rule could be modified to allow defendants to introduce evidence of pass-on charges when both indirect and direct purchasers had filed suit against antitrust defendants.[18] The Court rejected this argument, concluding that the modified rule would encourage large, cumbersome, and complex multiclass antitrust actions[19] and that the existence of the rule might allow the award of multiple damages against defendants.[20] The Court concluded that *Hanover Shoe*'s abolition of pass-on theories as a defense in antitrust suits should be extended to prohibit the use of pass-on theories by indirect purchaser plaintiffs.[21]

Soon after the *Illinois Brick* decision, the California legislature amended California's antitrust statute, the Cartwright Act, to state ex-

15. 431 U.S. at 726-27.

16. *Id.* at 741-43.

17. *Id.* at 745-47. The Court based its conclusion that allowing indirect purchasers a damages remedy would lessen private incentive to enforce the antitrust laws on two grounds. First, the indirect purchaser who might have a smaller individual injury would have less incentive to sue. *Id.* at 745. Second, the direct purchaser, faced with increased complexity and the threat of sharing the recovery, would not sue as readily. *Id.* Direct purchasers, however, might have *less* incentive to sue because they are dependent on the relationship with their suppliers or because they have passed on the injury. *See* 431 U.S. at 763 & n.23 (Brennan, J., dissenting); Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 913-14 & n.115 (1975); Note, *The Debate Over the Passing-On Concept in Antitrust Law: Is it Finally Settled?*, 15 HOUS. L. REV. 199, 209 (1977).

18. 431 U.S. at 729-30.

19. *Id.* at 731-32.

20. *Id.* at 730.

21. *Id.* at 729-36. Justice Brennan, in dissent, criticized the majority's perception of the evidentiary difficulties in proving pass-on injuries by citing the Court's sanction of that process in price discrimination cases. *Id.* at 751 (Brennan, J., dissenting); *see* Perkins v. Standard Oil Co., 395 U.S. 642 (1969) (permitting tracing of illegal overcharge through four levels of distribution). Commentators and economists have criticized the Court's perception of economic difficulties. *See, e.g.*, Cirace, *Price-fixing, Privity and the Passing-On Problem in Antitrust Treble Damage Suits: A Suggested Solution*, 19 WM. & MARY L. REV. 171, 179-89 (1977); Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883 (1975); Watson, *Bad Economics in the Antitrust*

pressly that the Cartwright Act afforded a treble damages remedy to indirect purchasers.[22] The *Illinois Brick* decision did not directly affect California's Cartwright Act because the decision was based on the

Courtroom: Illinois Brick and the "Pass-On" Problem, 9 ANTITRUST L. & ECON. REV. 69 (1977).

The majority's argument that multiple recoveries were possible was based on the supposition that direct and indirect purchasers could not be forced to litigate in a single forum. *See* 431 U.S. at 730-31. The Court's "avoidance of an indepth discussion of available procedural devices" caused one commentator to discount the importance of this factor. Note, *Antitrust: The Offensive Use of Passing-On*, 17 WASHBURN L.J. 374, 380-81 (1978). Other commentators have suggested that the Court could have considered other procedures, such as barring subsequent suits on failure to intervene, transferring the cause under 28 U.S.C. § 1407 (1976), requiring a bond or escrow of prior judgments or settlements until the statute of limitations runs, or applying equitable set-offs. *See, e.g.*, Note, *The Debate Over the Passing-On Concept in Antitrust Law: Is it Finally Settled?*, 15 HOUS. L. REV. 199, 211 (1977); Note, *Anti-Trust Law—Private Actions: The Supreme Court Bars Treble-Damage Suits by Indirect Purchasers*, 56 N.C.L. REV. 341, 350-51 (1978). In any event, interpretations of Federal Rule of Civil Procedure 23 would probably limit consumer class access to federal damages remedies, thus limiting the possibility of multiple treble damages awards in the federal courts. See notes 24-85 & accompanying text *infra*.

It has been suggested that the fear of unmanageably large lawsuits was the major factor in the Court's decision in *Illinois Brick*. *See, e.g.*, Note, *supra*, 56 N.C.L. REV. at 345-47 (1978). Justice Brennan, in his dissenting opinion, did not address this issue specifically. In light of his firm belief that it was "difficult to see how Congress could have expressed itself more clearly" that the indirect purchasers had a federal claim for relief, 431 U.S. at 758, he probably would not have accepted the unmanageability argument.

Congress considered bills repealing *Illinois Brick* in the 95th Congress, *see, e.g.*, S. 1874, 95th Cong., 2d Sess. (1978), and the 96th Congress, *see, e.g.*, S. 300, 96th Cong., 1st Sess. (1979). At least one commentator confidently predicted the passage of S. 300. Comment, *Congressional Authorization of Indirect Purchaser Treble Damage Claims: The Illinois Brick Wall Crumbles*, 47 FORDHAM L. REV. 1025, 1026 (1979). However, the bill met resistance from both plaintiffs' and defendants' attorneys. *See Antitrust Enforcement Act of 1979: Hearings before the Senate Committee on the Judiciary on S. 300*, 96th Cong., 1st Sess. 230-52 (1979) (statements of panel of plaintiffs' attorneys including Perry Goldberg, Harold E. Kohn, James Sloan, and Guido Saveri); *id.* at 280-90 (statements of panel of defense attorneys including Samuel W. Murphy, Jr., Boyden C. Gray, and Robert E. Liedquist). Apparently, the bill has died.

22. "Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant." 1978 Cal. Stat. ch. 536, § 1, at 1693 (amending CAL. BUS. & PROF. CODE § 16750(a) (West Supp. 1981)). The legislature further stated, "The amendment . . . does not constitute a change in, but is declaratory of, the existing law." 1978 Cal. Stat. ch. 536, § 2, at 1693. The Ninth Circuit had recognized that the California state courts might not follow the federal rule as enunciated in *Illinois Brick*. *See In re* Sugar Antitrust Litigation, 588 F.2d 1270 (9th Cir. 1978). *But see In re* Wiring Device Antitrust Litigation, 498 F. Supp. 79, 85-86 (E.D.N.Y. 1980) (anticipating that South Carolina state courts would follow *Illinois Brick* and prevent indirect purchasers' recoveries); Russo & Dublin v. Allied Maintenance Corp., 95 Misc. 2d 344, 407 N.Y.S.2d 617 (Sup. Ct. 1978) (accepting rationale of *Illinois Brick* and applying it to New York antitrust law). At least five other states have a statutory remedy for indirect puchasers. *See* HAWAII REV. STAT. § 480-13(c), -14 (Supp. 1981); ILL. ANN. STAT. ch. 38, § 60-7(2) (Smith-Hurd Supp. 1980-81); N.M. STAT. ANN. § 57-1-3(A) (Supp. 1981); S.D.

Court's interpretation of federal antitrust statutes.[23]

Class Action Procedures in the Federal and California Courts

The class action is an essential procedural device in many antitrust actions because the claims of numerous individuals can be litigated in a single lawsuit without each individual's direct participation.[24] The availability of this procedure is particularly important in consumer antitrust actions in which the ultimate consumer of a product suffered a relatively small individual injury because the maintenance of a lawsuit by one individual would be economically infeasible. When each consumer's individual injury is aggregated with other similarly situated consumers' injuries, however, litigation to recover damages for those injuries may become economically practical. Several differences between federal and California class action procedures have significant effects on consumer antitrust class actions.

The Notice Requirement

An important aspect of the class action procedure upon which California and federal courts differ is the requirement of notice to unnamed class members. The class action purports to adjudicate finally the rights of unnamed class members who do not participate directly in the lawsuit.[25] As a matter of constitutional due process, however, the rights of an absent class member cannot be subject to a binding final judgment unless constitutionally effective notice has been given to the class.[26] California and federal law differ on whether constitutionally

CODIFIED LAWS ANN. § 37-1-33 (Supp. 1980) (but limiting private class actions); WIS. STAT. ANN. § 133.18(1) (West Supp. 1980-81).

23. 431 U.S. at 726. The Court invited Congress to amend § 4 of the Clayton Act if it disagreed with the Court's interpretation. *Id.* at 733 n.14. *See generally* Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309, 322 n.60, 323-24 (1977); Note, *Illinois Brick and Consumer Actions: The Passing Over of the Passing-On Doctrine*, 6 HOFSTRA L. REV. 361, 362 (1978); Note, *Hanover Shoe Inc. Rule Bars Offensive Use of Passing-On Doctrine by Indirect Purchasers*, 23 VILL. L. REV. 381, 393 (1978). The California courts, however, traditionally have followed federal antitrust decisions in interpreting California's Cartwright Act. *See* Corwin v. Los Angeles Newspaper Serv. Bureau, 4 Cal. 3d 842, 852-53, 484 P.2d 953, 959, 94 Cal. Rptr. 785, 791 (1971). Therefore, the California legislature may have felt it important to direct the state courts to allow indirect purchasers to recover treble damages.

24. *See generally* Grossman, *Class Actions: Manageability and the Fluid Recovery Doctrine*, 47 L.A.B. BULL. 415 (1972); Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(c)(3)*, 54 F.R.D. 501, 506-08 (1972); Note, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972).

25. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974); FED. R. CIV. P. 23(c)(3); Advisory Committee's Note to Proposed Rule 23, 39 F.R.D. 98, 105 (1966).

26. A judgment is not binding unless notice meets due process requirements. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950); Richmond Black

effective notice is a prerequisite to the maintenance of a class action.[27]

Federal law

In *Eisen v. Carlisle & Jacquelin* (*Eisen IV*),[28] the United States Supreme Court held that Federal Rule of Civil Procedure 23 requires that individual notice to all identifiable class members be given before a class action brought under Rule 23(b)(3) may proceed.[29] The Court in *Eisen IV* was faced with a consumer class, purchasers of stock in odd-lot transactions, that was estimated to contain six million members. Approximately two and one-quarter million members could be identified from the defendant stock brokers' records.[30] The Court reasoned that Rule 23, governing class actions in federal courts, was intended to ensure that judgments would bind all parties.[31] The plaintiff argued that he should not be required to provide individual notice to identifiable class members because Rule 23 should be administered flexibly to permit maintenance of the action. The plaintiff also argued that there was no incentive to sue individually because the claims were too small.[32] Rejecting these arguments, the Court held that individual notice to identifiable class members was an "unambiguous requirement of Rule 23," which could not be waived by a court.[33]

California law

Although California courts have referred to federal interpretations

Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151 (E.D. Va. 1974). In *Mullane*, the Supreme Court stated that "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . ." is required to satisfy due process. 339 U.S. at 314. The Court further admonished that "[w]here the name and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318.

27. *Compare* Cartt v. Superior Court, 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975) *with* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

28. 417 U.S. 156 (1974). The *Eisen* litigation produced a prodigious number of published decisions concerning federal class action procedures. District court opinions are reported at 41 F.R.D. 147 (S.D.N.Y. 1966); 52 F.R.D. 253 (S.D.N.Y. 1971); 54 F.R.D. 565 (S.D.N.Y. 1972). Appellate decisions are reported at 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (Eisen I); 391 F.2d 555 (2d Cir. 1968) (Eisen II); 479 F.2d 1005 (2d Cir. 1973) (Eisen III).

29. 417 U.S. at 173-77. The Court found that the Rule 23 notice requirement was designed to fulfill the constitutional due process notice standards articulated in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962).

30. 417 U.S. at 166-67.

31. *Id.* at 176.

32. *Id.* at 175-76.

33. *Id.* at 176.

of Rule 23,[34] they are not bound by the United States Supreme Court's interpretations of the Rule.[35] California's class action statute does not contain the detailed procedures outlined in the federal rule,[36] and California's courts have exercised greater discretion than have federal courts in fashioning class action procedures.[37]

California courts have been flexible in their treatment of the extent of notice required to maintain a class action. In *Cartt v. Superior Court*,[38] a California court distinguished two issues in determining how extensive notice to the class must be. The court found that the determination of the extent of notice required to ensure a final judgment, immune from collateral attack, is governed by constitutional due process,[39] and that the extent of notice necessary to permit the maintenance of a class action in state court is a matter of state procedural

34. California courts may use federal interpretations of Rule 23 as a last resort for procedural guidance. See note 36 *infra*.

35. Although the Court in *Eisen IV* discussed the constitutional notice requirement, its holding in the case was based on the language of Rule 23. *See id.* at 173-77; *see also* Cartt v. Superior Court, 50 Cal. App. 3d 960, 968-69, 124 Cal. Rptr. 376, 381 (1975); Jacobi & Cherasky, *The Effects of Eisen IV and Proposed Amendments of Federal Rule 23*, 12 SAN DIEGO L. REV. 1, 10-17 (1974); McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351, 1405 Author's Note (1974). For an exhaustive list of courts and commentators who have expressed views on the question of whether *Eisen IV* is an interpretation of Rule 23 or whether it states a constitutionally binding rule, see Comment, *Cost Allocation in California Class Actions*, 13 CAL. W. L. REV. 65, 73 n.57 (1977).

36. CAL. CIV. PROC. CODE § 382 (West 1973) provides: "If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." *See also* SUPERIOR COURT MANUAL FOR CONDUCT OF PRETRIAL PROCEEDINGS IN CLASS ACTIONS (1974). The Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1750-1782 (West 1973 & Supp. 1981), is not applicable to antitrust violations, *see id.* § 1770, but its detailed class action procedures, *see id.* § 1781, are sometimes used as a guide by trial courts. *See* Vasquez v. Superior Court, 4 Cal. 3d 800, 809, 484 P.2d 964, 977, 94 Cal. Rptr. 796, 809 (1971). As a last resort, the California courts may look to Rule 23 and federal cases governing it for procedural guidance. *Id.*

37. In addition to the three contrasts between the California and federal class action procedures discussed in this Comment, at least two other features of California class action law are more favorable to plaintiffs than the corresponding federal procedure. Class members may aggregate claims for jurisdictional purposes under California law while they cannot under federal law. *Compare* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 443 P.2d 732, 63 Cal. Rptr. 724 (1967) *with* Snyder v. Harris, 394 U.S. 332, 336 (1969) *and* Zahn v. International Paper Co., 414 U.S. 291, 299 (1973). Under California law, a class attorney may also be a named class plaintiff, while under federal law this dual role is disallowed. *Compare* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 224 (1967) *and* Saxer v. Philip Morris, Inc., 54 Cal. App. 3d 7, 18 n.1, 126 Cal. Rptr. 327, 333 n.1 (1975) *with* Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973).

38. 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975).

39. *Id.* at 969, 124 Cal. Rptr. at 382.

law.[40] In determining the extent of notice required to certify a class, a California court relies on a strong state policy favoring consumer class action suits.[41]

In *Cartt*, the court considered a proposed class of all purchasers of Chevron gasoline who lived in southern California. The plaintiff sought to notify the class of the proposed action by newspaper publication, but the trial court ordered that individual notice be mailed to all identifiable credit card holders.[42] The court of appeal remanded with instructions that the published notice would be sufficient to maintain the suit. The court took a pragmatic view of the purpose of notice in a class action. Although absent consumers arguably could attack the judgment collaterally, the court reasoned that the small individual stakes of the plaintiff class members made the collateral attack unlikely.[43] Therefore, notice through publication could achieve a judgment that would be final for practical purposes.[44]

Costs of Notice

The cost of giving preliminary notice to a large class may be burdensome when individual notice must be given.[45] Arguably, in an anti-

40. *Id.* at 970, 124 Cal. Rptr. at 383.

41. *Id.* The California Supreme Court explained this policy in Vasquez v. Superior Court, 4 Cal. 3d 800, 808, 484 P.2d 964, 968, 94 Cal. Rpr. 796, 800-01 (1971): "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society . . . . Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary byproducts, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial." *See generally* Barnoff, Lobell, Louisell, Miller, Warren & West, *Comments on Vasquez v. Superior Court*, 18 U.C.L.A. L. REV. 1041 (1971); Note, *Judicial Protection for the Consumer: Vasquez v. Superior Court*, 23 HASTINGS L.J. 513 (1972).

42. 50 Cal. App. 3d at 965, 124 Cal. Rptr. at 379.

43. *Id.* at 969 & n.15, 971, 124 Cal. Rptr. at 382 & n.15, 384. The court noted, however, that if individual damages were large, constitutionally effective notice could be required to protect the integrity of the class action judgment. *Id.* at 973, 124 Cal. Rptr. at 385; *see also* Cooper v. American Sav. & Loan Ass'n, 55 Cal. App. 3d 274, 127 Cal. Rptr. 579 (1976).

44. Several of the other sources of California class action procedures, see note 36 *supra*, also do not require individual notice. *See* CAL. CIV. CODE § 1781(c)(3) (West 1973); SUPERIOR COURT MANUAL FOR CONDUCT OF PRETRIAL PROCEEDINGS IN CLASS ACTIONS § 427, ¶ 6, at 113 (1974).

45. For example, in the *Eisen* litigation the cost of mailing individual notice was estimated to be $315,000 using the 1974 postal rate of 10¢. 417 U.S. at 167. In *Cartt*, the estimated mailing cost was $68,718, also in 1974 postal rates. 50 Cal. App. 3d at 965, 124

trust action involving a widely used consumer commodity, every household in the state is an identifiable class member and must receive individual notice. Even when the action involves a less widely distributed commodity, such as a consumer appliance, the defendant's warranty records may provide an extensive list of names and addresses of class members to whom individual notice may be required.

Traditionally, such prejudgment costs are borne by the plaintiff.[46] However, requiring the named plaintiffs in a large class action suit to advance substantial sums of money to provide notice when their individual injuries are small may prevent the lawsuit from proceeding. In many instances, the cost of individual notice would offset a large portion of the potential recovery.[47] Even when the identifiable plaintiffs are not numerous, a plaintiff who has a small individual injury may be reluctant to finance the notice to all similarly situated class members. Requiring individual notice and insulating defendants from the cost often may discourage large consumer class actions involving relatively small individual recoveries. Therefore, named plaintiffs in consumer classes have suggested that defendants be ordered to bear all or a portion of the cost of giving preliminary notice to the unnamed class members.

Federal law

In *Eisen IV*, the United States Supreme Court unequivocally held that a trial court could not order defendants to bear any part of the cost of preliminary notice to the plaintiff class.[48] The Court reasoned that Rule 23 provided the entire authority for class actions in the federal courts.[49] Nothing in Rule 23, however, authorized such cost shifting; therefore, the costs could not be shifted.[50]

California law

The California Supreme Court, in *Civil Service Employees Liability Insurance Co. v. Superior Court*,[51] held that a trial court has discretion to order a defendant in a class action suit to bear all or part of the costs

Cal. Rptr. at 379; *see also* Cosgrove v. First Merchants Nat'l Bank, 68 F.R.D. 555, 560-61 (E.D. Va. 1975) ("small recoveries in issue will be largely eliminated by the administrative costs of the suit"); Considine v. Park Nat'l Bank, 64 F.R.D. 646, 648 (E.D. Tenn. 1974) (cost of notice "could be economically prohibitive when compared to the potential recovery").

46. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. at 178.

47. *See In re* Motel Telephone Charges, 500 F.2d 86, 91 (9th Cir. 1974) (court estimates that recovery would be "entirely consumed by the costs of notice alone").

48. 417 U.S. at 177.

49. *Id.*

50. *Id.* at 177-79.

51. 22 Cal. 3d 362, 584 P.2d 497, 149 Cal. Rptr. 360 (1978).

of initial notice of the suit.[52] The court centered its analysis on California's policy favoring consumer class actions.[53] The cost-shifting procedure, the court reasoned, permits consumer class actions to be decided on their merits and therefore is "neither arbitrary nor irrational and thus does not abridge substantive due process guarantees."[54] The defendant argued that ordering it to pay the costs of notice without a final judgment violated procedural due process. Noting that the trial court had held a hearing in which it considered the likelihood that the plaintiff would prevail, the Supreme Court concluded that the hearing was sufficient to protect the defendant's procedural due process rights.[55]

A second approach to the cost-shifting issue was suggested in *Carlt v. Superior Court*.[56] The court was reluctant to burden the trial court with extensive evidentiary presentations in pretrial hearings. The court suggested that, to survive a due process challenge, a court must hold some type of adversary hearing before ordering a defendant to pay the costs of notice. A mini-hearing was suggested as the appropriate procedure.[57] The court sanctioned notice that was arguably less extensive than that which would be required to make the final judgment legally binding upon unnamed plaintiff class members.[58] The court commented, however, that if the defendant was "sincerely troubled about the res judicata effect of this litigation," it should be allowed to finance notice that would provide a legally binding judgment.[59] The court, therefore, shifted to the defendant the decision to finance more complete notice. The defendant could accept the court of appeal's sugges-

52. *Id.* at 376, 584 P.2d at 506, 149 Cal. Rptr. at 369; *see also* Roth v. Department of Veteran Affairs, 110 Cal. App. 3d 622, 167 Cal. Rptr. 552 (1980) (shifting a portion of notice costs). Both the Consumer Legal Remedies Act, CAL. CIV. CODE § 1781(d), and the SUPERIOR COURT MANUAL FOR CONDUCT OF PRETRIAL PROCEEDINGS IN CLASS ACTIONS § 427, ¶ 6, at 113 (1974), permit cost-shifting.

53. 22 Cal. 3d at 376, 584 P.2d at 505, 149 Cal. Rptr. at 368.

54. *Id.* at 378, 584 P.2d at 506, 149 Cal. Rptr. at 369.

55. *Id.* at 380, 584 P.2d at 508, 149 Cal. Rpr. at 371. Justice Clark, dissenting, argued that the cost-allocation order abridged the defendant's right to procedural due process. *Id.* at 382, 584 P.2d at 509, 149 Cal. Rptr. at 372. Justice Clark reasoned that the nature and scope of the requisite hearing was insufficient to balance the respective interests. *Id.* at 383, 584 P.2d at 510, 149 Cal. Rptr. at 373. Justice Clark suggested that the defendant would not recover the advanced costs even if he or she prevailed on the merits, because the named plaintiff was admittedly unable to bear such costs. *Id.* at 382, 584 P.2d at 509, 149 Cal. Rptr. at 372. He noted that "[t]he traditional method of financing class litigation involving minor claims of many plaintiffs . . . is for counsel to advance the costs." *Id.* at 386, 584 P.2d at 512, 149 Cal. Rptr. at 375. After balancing the respective interests, Justice Clark rejected the majority's decision that a pretrial hearing to determine the probable outcome of the action was sufficient to protect the defendant's right to procedural due process. *Id.* at 384-85, 584 P.2d at 510, 149 Cal. Rptr. at 373.

56. 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975).

57. *Id.* at 975, 124 Cal. Rptr. at 387.

58. See notes 38-44 & accompanying text *supra*.

59. 50 Cal. App. 3d at 974, 124 Cal. Rptr. at 386.

tion that notice financed by the plaintiff would be binding for practical purposes upon absent class members. If the defendant rejected this supposition, it could finance any further notice it believed would make the judgment legally binding.

Fluid Recovery

To maintain a class action suit, the class must be certified.[60] An important threshold certification issue is the manageability of the proposed class. To determine liability, the theory of liability and the means of proving and distributing damages must be capable of being established so that the rights of unnamed class members will be fairly adjudicated.[61] Manageability requires that damages can be efficiently distributed to a large class whose members have small individual damages.

A primary device for distributing damages to such classes is the fluid recovery, a device that enables the class members' damages to be proven and distributed without resorting to individual proof of claims.[62] Fluid recovery simplifies the task of computing and distributing the damages of a large consumer class.[63] Damages are computed on the basis of the defendant's total sales to members of the class, thereby precluding the need for each plaintiff to prove and collect his or her individual damages. Damages usually can be computed on the basis of the defendant's records. The total damages of the class constitute a fund out of which two payments usually are made. The first distribution from the fund is made to members of the class who come forward with proof of their individual injuries. If individual damages are small, this first payment probably will not distribute the entire fund because not all individuals will make the effort to collect. A second distribution is then made to reach, in a rough fashion, members of the class who have not come forward. The most popular means of the second distribution is through the relevant market for the product involved in the lawsuit. For example, a second distribution may be effected by offering a discount on the commodity that had been overpriced in an antitrust violation.[64] Another means of the second distribution may be to give the fund to a charity or a government agency to

60. FED. R. CIV. P. 23(c)(1).

61. FED. R. CIV. P. 23(b)(3); Advisory Committee's Note to Proposed Rule 23, 39 F.R.D. 98, 102-04 (1966).

62. *See generally* 3 NEWBERG ON CLASS ACTIONS § 4600 (1977); Grossman, *Class Actions: Manageability and the Fluid Recovery Doctrine*, 47 L.A.B. BULL. 415 (1972).

63. *See generally* Grossman, *Class Actions: Manageability and the Fluid Recovery Doctrine*, 47 L.A.B. BULL. 415 (1972); Note, *An Economic Analysis of Fluid Class Recovery Mechanisms*, 34 STAN. L. REV. 173 (1981).

64. *See generally* Note, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 458-63 (1972).

use the money to benefit members of the class.[65]

Fluid recovery is an important device in consumer class action suits because it obviates the need for each consumer to come forward and prove damages. By focusing on the defendant's unlawful gains, fluid recovery ensures full disgorgement of wrongful gains. Furthermore, by allowing flexibility in the distribution of damages, consumers who had minimal individual damages and did not claim their shares of the award might receive some benefit through a second distribution.

The issue of fluid recovery usually arises during the certification of the proposed class.[66] Because manageability of the proposed class is critical in both the federal and California class certification processes, the availability of fluid recovery may determine whether the action will proceed. If fluid recovery is not available, a consumer class might not be manageable, and therefore not certifiable, because proof of individual damages would consume an inordinate amount of court time and absent class members would not share in the damage recovery.[67]

Federal law

Federal courts have used fluid recovery to distribute monies paid as settlements in class action suits[68] and to distribute aggregate damages paid pursuant to a final judgment in a non-class action suit.[69] The use of fluid recovery to compute and distribute damages in class action suits, however, is disapproved by many of the federal circuit courts.[70]

The leading case criticizing fluid recovery is *Eisen v. Carlisle & Jacquelin* (*Eisen III*).[71] According to the Second Circuit in *Eisen III*, fluid recovery was not only outside the scope of Rule 23, but also violated due process.[72] Because fluid recovery was outside the scope of

65. *See id.* at 453-58.

66. *See, e.g.*, Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977).

67. *See id.* at 72. *But cf. In re* Memorex Security Cases, 61 F.R.D. 88, 103 (N.D. Cal. 1973) (class certified without fluid recovery).

68. *See, e.g.*, West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

69. *See* Bebchick v. Public Utilities Comm'n, 318 F.2d 187, 203-04 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963).

70. *See, e.g.*, Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977); *In re* Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974).

71. 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). In reviewing *Eisen III*, the Supreme Court expressly declined to rule on the fluid recovery issue. 417 U.S. at 172 n.10.

72. 479 F.2d at 1018. The Court did not analyze its declaration that fluid recovery would violate due process. It is unlikely that the defendant has a due process right to confront each class member if damages can be proven in some other trustworthy fashion. *See* McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351, 1403 (1974). While an absent plaintiff could be deprived of due process if he or she received no benefit from a suit maintained in

Rule 23, the court held that it could not be relied upon to make the class manageable.[73] As fluid recovery was unavailable, proof of individual injury and individual claims was required, but the *Eisen III* court found it impossible to provide such proof and therefore found the class unmanageable.[74]

California law

In *Bruno v. Superior Court*,[75] the California Court of Appeal recently held that a fluid recovery could be used to distribute damages in a Cartwright Act suit. The court determined that the decision whether to use a fluid recovery should be made by the trial court on a case by case basis,[76] but that nothing in California's class action procedure or antitrust law barred its use in every case.[77] According to *Bruno*, "[t]he

his or her right, due process violations may form the basis of a collateral attack. If a plaintiff successfully attacks a class action judgment on due process grounds, the judgment will not be binding. See note 26 *supra*.

73. 479 F.2d at 1018.

74. *Id.* at 1016-18. The Ninth Circuit has followed *Eisen III* in refusing to certify classes that rely on fluid recovery to show manageability. *See In re* Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974).

75. 127 Cal. App. 3d 120, 179 Cal. Rptr. 342 (1981).

76. *Id.* at 135, 179 Cal. Rptr. at 350. The issue was presented to the court after the trial court granted a motion to strike a prayer for a fluid distribution. *Id.* at 123, 179 Cal. Rptr. at 343. The court granted a writ of mandate vacating the order striking the prayer and directed the trial court to consider the propriety of fluid class recovery under the facts of the particular case. *Id.* at 135, 179 Cal. Rptr. at 350-51.

77. *Id.* at 134-35, 179 Cal. Rptr. at 350. The court had to reconcile Blue Chip Stamps v. Superior Court, 18 Cal. 3d 381, 386-87, 556 P.2d 755, 759, 134 Cal. Rptr. 393, 397 (1976), in which the California Supreme Court overruled a class certification in which the trial court partially relied on the availability of a fluid recovery to find the class was manageable. The *Bruno* court explained that *Blue Chip Stamps* merely held that fluid recovery was not proper under the facts of that case "because it would not have had any constructive effect—neither disgorging any illegal profit . . . nor compensating the injured class members." 127 Cal. App. 3d at 125, 179 Cal. Rptr. at 344. Neither disgorgement nor compensation could be served in *Blue Chip Stamps* because the alleged damages fund was in the possession of the state and there was little correlation between the class of persons injured and the class that would benefit from the proposed fluid recovery. *Id. Blue Chip Stamps* has not had a significant impact on California class action procedure, and is probably limited to its peculiar facts. *See* Hogya v. Superior Court, 75 Cal. App. 3d 122, 134-35, 142 Cal. Rptr. 325, 333-34 (1977) (overturning denial of certification of consumer class that relied on *Blue Chip Stamps*); Bacon v. County of Merced, 68 Cal. App. 3d 45, 48-49, 136 Cal. Rptr. 14, 16-17 (1977) (applying *Blue Chip Stamps* in a case in which fund was already in the possession of government agencies). *See generally The Supreme Court of California 1976-1977*, 66 CALIF. L. REV. 138, 215-33 (1978) (criticizing *Blue Chip Stamps*, arguing that its restrictive approach should be read as dicta with no significant precedential value). *Bruno* concluded that fluid recovery was consistent with the policy underlying California class actions, which is to adopt innovative procedures to insure that defendants who injure large numbers of persons in small amounts disgorge their ill-gotten gains. *Id.* at 127-28, 179 Cal. Rptr. at 345-46. See note 41 *supra*.

issue is whether a fluid recovery will sufficiently further [the purposes of the law under which the action is brought] given the facts of the particular case under consideration."[78] Finding that a fluid recovery could ensure that a defendant would be deterred from future wrongdoing,[79] and that injured plaintiffs could recover some compensation under the proper facts,[80] the *Bruno* court held that a fluid recovery could be consistent with the substantive policies of the California class action and antitrust laws.[81]

Challenges to a State Court Action

Removal

The differences between California and federal antitrust law and class action procedures have encouraged consumer plaintiffs to file antitrust suits in California courts. These same differences have led defendants to attempt to force plaintiffs to litigate their claims in federal court. The removal procedures allow a defendant in state court under certain circumstances to force a lawsuit to be transferred from state court to federal court even against the wishes of the plaintiff.[82] As removal to federal court offers several advantages for the antitrust defendant, so the device has often been used.[83]

78. 127 Cal. App. 3d at 130, 179 Cal. Rptr. at 347. *Bruno* followed the reasoning of Simer v. Rios, 661 F.2d 655 (7th Cir. 1981), which held that "[t]he general inquiry is whether the use of such a mechanism is consistent with the policy or policies reflected by the statute violated." *Id.* at 676. Thus, the *Bruno* court identified the important Cartwright Act policies of deterrence and punishment of unlawful acts, at 132, 179 Cal. Rptr. at 348-49, and compensation of the injured, *id.* at 132-33, 179 Cal. Rptr. at 349, which could be accomplished by a fluid recovery in the proper circumstances. *Id.* The *Bruno* court refused to accept the argument that the policy of compensating the injured required that damages be distributed "*only* to those who suffered injury and *only* in the amount that each person was injured." *Id.* at 132, 179 Cal. Rptr. at 349 (emphasis in original). All that was required was that there be a "significant correlation between the injured class and the class to be benefited by the distribution of damages." *Id.* at 132, 179 Cal. Rptr. at 349.

79. *Id.* at 132, 179 Cal. Rptr. at 348-49.

80. *Id.* at 132-33, 179 Cal. Rptr. at 349.

81. See note 77 *supra*. The court analyzed the Cartwright Act and concluded that fluid recovery would be proper to distribute damages awarded under it. *Id.* at 130-35, 179 Cal. Rptr. at 347-50. Although the court found that "[a] recovery of damages by someone who has not sustained damages is clearly contrary to the Cartwright Act," *id.* at 130, 179 Cal. Rptr. at 348, the court distinguished the recovery of damages from the distribution of damages. Under a fluid recovery, the damages are recovered by the class as soon as the judgment is entered in its favor. The fact that the damages may be distributed to some non-class members through a subsequent fluid mechanism would not, the court decided, be contrary to the Act. *Id.* at 131, 179 Cal. Rptr. at 348. Finally, the two goals of antitrust enforcement and compensation could be furthered by fluid recovery, so that the court concluded it was a viable mechanism for Cartwright Act class actions.

82. 28 U.S.C. § 1441(a) (1976).

83. Each of the California state actions listed in note 2 *supra* was removed. Each case

A class action in federal court must meet the strict requirements of Rule 23 whether the class relies on a federal or state theory of relief.[84] Therefore, a consumer suit that could be maintained in California court may be dismissed if removed to federal court. If indirect purchasers are forced to litigate claims for antitrust damages under federal law in federal court, their claims will be dismissed because the indirect purchaser ordinarily cannot recover damages under federal antitrust laws.[85]

Antitrust defendants also may seek removal to consolidate litigation and to avoid the burden of defending multiple suits. Plaintiffs frequently have filed actions in California courts concerning the same basic issues being litigated concurrently in federal courts.[86] Multiple actions also may have been filed in federal district courts throughout the country, but such federal litigation usually is consolidated under federal law,[87] thereby reducing the burdens on defendants in preparing, settling, or litigating the cases. There is no corresponding procedure by which actions in a state court can be consolidated with a federal action.[88] Hence, if similar actions are brought in state and federal courts, a defendant must defend in several forums if it is unable to remove state cases to the federal court.

Generally, an action is removable to federal court if the district courts of the United States have original jurisdiction of the action filed in the state court.[89] The defendant makes a motion to remove an action by filing a notice that states the grounds for removal in the appropriate federal district court and the case is removed automatically to federal court.[90] The plaintiff then may move the federal court to remand the case on the grounds that it was improvidently removed.[91]

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was remanded except Gayer v. Cuisinarts, Inc., No. 458970 (Super. Ct. San Diego County, Cal., filed Sept. 23, 1980).

84. The Federal Rules of Civil Procedure apply to all civil actions removed to the federal district courts. FED. R. CIV. P. 1, 81(c). Although meeting Rule 23's strict standards may be outcome determinative, and thus arguably substantive and controlled by state law, *see* Guaranty Trust Co. v. York, 326 U.S. 99 (1945), the federal rules are by definition procedural and not substantive, 28 U.S.C. § 2072 (1976), and therefore will control actions in federal court. Hanna v. Plumer, 380 U.S. 460, 471 (1965).

85. See notes 6-21 & accompanying text *supra*.

86. See note 3 *supra*.

87. 28 U.S.C. § 1407 (1976) permits the transfer to a single forum of actions filed in any federal district court. *See generally* Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001 (1974). The federal cases listed in note 3 *supra* have been consolidated under § 1407.

88. There is, however, a procedure provided under California law for coordinating actions filed in separate California state courts. CAL. CIV. PROC. CODE §§ 404-404.8 (West 1973 & Supp. 1981).

89. 28 U.S.C. § 1441(a) (1976).

90. *Id.* § 1446.

91. *Id.* § 1447.

The burden shifts to the defendant to establish that the required federal jurisdiction exists.[92] Although antitrust defendants occasionally have attempted to use diversity jurisdiction[93] as grounds for removal,[94] a primary controversy in antitrust class actions involves removal based on federal question jurisdiction.[95]

Federal Question Removal

A plaintiff's claim presents a federal question, and is therefore removable, if the matter in controversy "arises under the Constitution, laws, or treaties of the United States."[96] The Supreme Court has interpreted the phrase "arising under" to mean that "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."[97] Such a federally created right or immunity is "essential" to the plaintiff's relief only if the plaintiff's claim "will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they received another."[98]

92. *See* P.P. Farmers' Elevator Co. v. Farmers Elevator Mut. Ins. Co., 395 F.2d 546 (7th Cir. 1968).

93. *See* 28 U.S.C. § 1332 (1976).

Jurisdiction based on diversity requires that the citizenship of opposing parties be diverse, *id.* § 1332(a), and that there be an amount in controversy greater than ten thousand dollars. *Id.* The plaintiff may forestall removal based on diversity by pleading the existence of fictitious defendants whose citizenship destroys complete diversity. *See* Goldberg v. CPC Int'l, Inc., 495 F. Supp. 233, 236 (N.D. Cal. 1980). A real defendant must be joined at some point, however, or the action may be removed. *See* Preaseau v. Prudential Ins. Co., 591 F.2d 74, 76-79 (9th Cir. 1979). Even if there is diversity of citizenship, the amount in controversy requirement is problematic in the context of consumer class actions. Although aggregate damages may be large, individual damages are likely to be small. The individual damages may not be aggregated to meet the jurisdictional requirement, Snyder v. Harris, 394 U.S. 332 (1969), and class members who do not have the required amount in controversy may not "piggyback" on the claims of class members who do have it. Zahn v. International Paper Co., 414 U.S. 291, 300-02 (1973). Therefore, it would seem that the requirement cannot be met in consumer class actions. Nonetheless, the district courts have split on the issue of whether the statutory award of attorneys' fees to the named plaintiff may satisfy the amount in controversy requirement. *Compare In re* Wiring Device Antitrust Litigation, 498 F. Supp. 79, 81-82 (E.D.N.Y. 1980) *with* Rosack v. Volvo of America Corp., 421 F. Supp. 933, 937 (N.D. Cal. 1976). Although the federal court would apply state substantive law in a case removed on diversity grounds, Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the federal court would apply the federal class action procedures to the possible detriment of a consumer class. See note 84 & accompanying text *supra*.

94. *See In re* Wiring Device Antitrust Litigation, 498 F. Supp. 79, 81-82 (E.D.N.Y. 1980); Goldberg v. CPC Int'l, Inc., 495 F. Supp. 233 (N.D. Cal. 1980).

95. Removal on grounds of diversity presents a number of factual issues that are peculiar to individual cases. Therefore, this Comment discusses only the issues surrounding removal on federal question grounds.

96. 28 U.S.C. § 1331 (1976).

97. Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936).

98. *Id.*

The analysis of whether a federal question exists therefore focuses on the basis of the plaintiff's claim for relief. Courts generally have limited that scope of inquiry into the basis of the claim to an examination of the allegations of the plaintiff's complaint.[99] Inquiry is limited because "the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit arising under' the . . . law of the United States . . . ."[100] Thus, traditionally, the plaintiff determines whether the action arises under federal law by pleading the legal basis of recovery in the complaint.

In some cases, however, federal courts have refused to limit this inquiry to an examination of the legal basis of a plaintiff's complaint.[101] These courts have sought to determine whether the real nature of the claim is federal, regardless of a plaintiff's characterization.[102] This process of "looking behind" a plaintiff's avowed reliance on state law seems to conflict with the traditional view that a plaintiff "is master to decide what law he will rely upon."[103]

Courts that have sought to determine whether a claim is "federal in nature," however, normally have done so only when the defendant shows that the state law the plaintiff has pled cannot support the plaintiff's recovery.[104] Usually, courts have reached this conclusion because the state law relied upon is preempted by federal law.[105] In some instances, the courts have recharacterized a plaintiff's claims as federal when the state law relied upon by the plaintiff could not support a recovery based on the allegations of the complaint.[106] Recently, how-

99. *See* Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-28 (1974) (*per curiam*) (citing Gully v. First Nat'l Bank, 299 U.S. 109, 113 (1936)).

100. The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 25 (1913).

101. *See, e.g.*, Moitie v. Federated Dep't Stores, 611 F.2d 1267 (9th Cir. 1980), *rev'd on other grounds*, 101 S. Ct. 2424 (1981); *In re* Wiring Device Antitrust Litigation, 498 F. Supp. 79 (E.D.N.Y. 1980); Three J Farms v. Alton Box Board Co., 1979-1 Trade Cas. (CCH) ¶ 62, 423 (D.S.C. 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); Beech-Nut Inc. v. Warner Lambert Co., 346 F. Supp. 547 (S.D.N.Y. 1972); Ulichny v. General Electric Co., 309 F. Supp. 437 (N.D.N.Y. 1970); Prospect Dairy, Inc. v. Dellwood Dairy Co., 237 F. Supp. 176 (N.D.N.Y. 1964). *See also* cases cited in 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722, at 566 n.37 (1976).

102. The doctrinal basis of this practice by some federal courts is not clear. Professors Wright, Miller, and Cooper have suggested that the courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum." 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722, at 565-66 (1976).

103. The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 25 (1913).

104. *See* 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722, at 363-69 (1976).

105. *See, e.g.*, American Synthetic Rubber Corp. v. Louisville & N.R.R. Co., 422 F.2d 462 (6th Cir. 1970); Johnson v. England, 356 F.2d 44 (9th Cir.), *cert. denied*, 384 U.S. 961 (1966).

106. *See, e.g.*, Three J Farms v. Alton Box Board Co., 1979-1 Trade Cas. (CCH) ¶

ever, in *Federated Department Stores v. Moitie*,[107] the United States Supreme Court, in a situation in which the state law may have supported recovery, seemed to approve a district court's refusal to remand because the plaintiff's claim was federal in nature.

Federated Department Stores v. Moitie

In *Federated Department Stores*, the Court ruled that an action filed in California state court by direct purchasers relying upon California common law was properly removed to the federal court.[108] The Court found that "at least some of the claims had a sufficient Federal character to support removal" and refused to question the district court's "factual" finding that the plaintiffs "had attempted to avoid removal jurisdiction by 'artfully' casting their 'essentially federal law claims' as state-law claims."[109]

The Court's removal holding was incidental to the more important res judicata issue in the case, which grew out of the complex procedural posture. This holding, however, was a necessary jurisdictional prerequisite to the Supreme Court's reversal of the Ninth Circuit's res judicata exception.[110]

The underlying claim involved price fixing of clothing by defendant retail stores; the plaintiffs were direct-purchaser consumers.[111] Of the seven actions originally filed, the same attorney instituted two actions—Moitie's action in California state court and Brown's action in federal court.[112] Moitie's action was removed to federal court, but this removal was not challenged and played no part in the Court's decision.[113] When Moitie's action was removed, all seven actions were then in federal court, and all were dismissed on the grounds that plaintiff consumers could not recover under the federal antitrust laws because they were not "injured in their business or profession" within the meaning of section 4 of the Clayton Act.[114] The plaintiffs in five of the actions appealed, but neither Moitie nor Brown appealed this adverse decision and their judgments of dismissal were therefore final.[115]

62,423 (D.S.C. 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

107. 101 S. Ct. 2424 (1981).

108. *Id.* at 2427 n.2.

109. *Id.*

110. If there had been no proper jurisdiction upon removal, the case should have been remanded to state court, *see* 28 U.S.C. § 1447 (1976), without reaching the res judicata issue.

111. 101 S. Ct. at 2426.

112. *Id.*

113. *See id.*

114. Weinberg v. Federated Dep't Stores, 426 F. Supp. 880, 883-85 (N.D. Cal. 1977) (construing 15 U.S.C. § 15 (1976)), *rev'd mem.*, 608 F.2d 1374 (9th Cir. 1979).

115. *See* 101 S. Ct. at 2426.

Plaintiffs Moitie and Brown then filed suits in California state court.[116] Defendants removed both actions and Moitie and Brown both moved to remand the actions to state court.[117]

The district court refused to remand, finding that the plaintiffs had an "essentially federal law claim" and that they therefore could not "defeat removal by employing artful pleading to cast [their] claim . . . in terms of state law."[118] The district court then dismissed the plaintiffs' claims on the grounds that the unappealed dismissal of their original action was res judicata and barred the present action.[119]

The Ninth Circuit approved the district court's resolution of the removal issue without citation to authority, by summarily concluding that the plaintiffs' claims were federal: "The court below correctly held that the claims presented were federal in nature, arising solely from price fixing on defendants' part. In light of our disposition of this appeal, appellants will not quarrel with the result."[120] The Ninth Circuit held that the plaintiffs' claims were not barred by res judicata by fashioning an exception to the traditional res judicata rule.[121]

The Supreme Court was concerned primarily with the res judicata issue and followed the Ninth Circuit's summary disposition of the remand issue.[122] The Court's disposition of the remand issue presents several questions concerning the operation of the removal procedure. First, recharacterizing the plaintiffs' complaint to allow removal apparently is contrary to traditional remand procedure, which limits scrutiny to the face of the complaint.[123] Second, by characterizing as "factual"

116. This state court filing was Moitie's second and Brown's first. Moitie's first suit in state court had been removed, consolidated, and dismissed. Removal was not questioned in the first state court action. *Id.*

117. *See* Moitie v. Federated Dep't Stores, 611 F.2d 1267, 1268 (9th Cir. 1980).

118. Moitie v. Federated Dep't Stores, No. C-77-0576, slip. op. at 5-6 (N.D. Cal. July 6, 1977). The single authority cited for this holding was a case concerning preemption. New York v. Local 1115 Joint Board, Nursing Home and Hospital Employees Div., 412 F. Supp. 720 (E.D.N.Y. 1976). This case actually rejected the defendant's argument that the state law basis for the plaintiff's claim was preempted. *Id.* at 723. The court reasoned that it would be "illogical to say that the litigant's claim is really predicated on a body of law which grants him no rights." *Id.* Even if the state law was preempted, the court noted that it "should be decided as a matter of defense in the State courts in the first instance . . . ." *Id.* at 724.

119. Moitie v. Federated Dep't Stores, No. C-77-0576, slip. op. at 6 (N.D. Cal. July 6, 1977).

120. Moitie v. Federated Dep't Stores, 611 F.2d 1267, 1268 (9th Cir. 1980). The parties apparently considered the removal issue to be the crucial one in the appeal because they "devoted their briefs and oral arguments to the removal issue." *Id.* at 1268 n.2. The parties did not brief the res judicata issue, which was the primary interest of the court of appeals. *Id.*

121. *Id.* at 1269-70.

122. The Supreme Court discussed the removal issue in a single footnote. *See* 101 S. Ct. at 2427 n.2.

123. *See* Phillips Petroleum Co. v. Texaco, 415 U.S. 125, 127-28 (1974) (per curiam) (citing Gully v. First Nat'l Bank, 299 U.S. 109, 113 (1936)).

the lower court's finding that the plaintiffs' claims were federal in nature, the Court has departed from normal practice. Usually, judicial scrutiny is limited to matters appearing on the face of the plaintiff's complaint. The "factual" approach will encourage inconsistent results by apparently limiting the scope of appellate review.[124] Third, by accepting jurisdiction on the grounds that the state complaint actually pled a Sherman Act claim, the federal courts should have dismissed the action for lack of jurisdiction under the doctrine of derivative jurisdiction.[125] This approach was overlooked by the Supreme Court in *Federated Department Stores*.[126]

Reconciling Federated Department Stores with Removal Procedures

The question whether a plaintiff's claim presents a federal question generally has been resolved by asking whether it is apparent from

124. The difficulty presented by *Federated Department Stores* was demonstrated by the contrasting treatment of suits that were arguably by direct purchasers in the Northern and Southern Districts of California. In a consumer class action suit alleging vertical price fixing, Judge Patel of the Northern District relied on Washington v. American League of Professional Baseball Clubs, 460 F.2d 654 (9th Cir. 1972) (derivative jurisdiction doctrine compelled remand), to order remand. *See* Louie v. Cuisinarts, Inc., No. C-80-3929 (N.D. Cal. Dec. 5, 1980). Judge Thompson of the Southern District relied on the Ninth Circuit decision, Moitie v. Federated Dep't Stores, 611 F.2d 1267 (9th Cir. 1980), to deny a motion to remand in a parallel case. *See* Gayer v. Cuisinarts, Inc., No. 80-1675 (S.D. Cal. Feb. 27, 1981) (amended order denying motion to remand). Judge Thompson found that *Baseball* "involved a situation manifestly different and distinguishable from the one presented at bar. Rather, this case closely resembles the facts of the more recent decision denying remand in the case of *Moitie v. Federated Department Stores*." *Id.* at 2. Judge Thompson reasoned that *Moitie* controlled because the plaintiffs' alleged facts gave "rise to both federal and state antitrust claims for relief." *Id.* Thus, Judge Thompson did not limit *Moitie* to circumstances involving preemption or res judicata, see notes 151-53 & accompanying text *infra*, but rather applied it to a case in which the plaintiff admittedly did have a state law claim. Furthermore, Judge Thompson suggested that derivative jurisdiction, see notes 145-48 & accompanying text *infra*, was not an issue in the case precisely because the plaintiff had both a state and federal law claim. In his view, the federal claim that gave his court jurisdiction had somehow arisen *after* the case was removed, and thus was not present in the state court.

125. See notes 145-48 & accompanying text *infra*.

126. At least one other argument may be advanced to challenge removal of consumer antitrust claims. The federal class action procedures may require dismissal of large consumer classes if they are forced to litigate in the federal forum. See notes 24-85 & accompanying text *supra*. Courts have recognized that it is illogical and improper to remove a case when that removal will deprive the plaintiff of relief under either federal or state law. *See In re* Sugar Antitrust Litigation, 588 F.2d 1270 (9th Cir. 1978), *discussed in* text accompanying notes 154-58 *infra*; New York v. Local 1115 Joint Board, Nursing Home and Hospital Employees Div., 412 F. Supp. 720 (E.D.N.Y. 1976). Therefore, it can be argued that removing a class action that cannot be maintained in federal court is an improper use of removal. *But see In re* Wiring Device Antitrust Litigation, 498 F. Supp. 79 (E.D.N.Y. 1980) (despite reliance on state law, true nature of the complaint was federal; because indirect purchasers have no right of action under federal antitrust laws, the action was dismissed).

the complaint that the relief sought rests on an interpretation of federal law.[127] *Federated Department Stores* approaches removal differently. According to the district court's opinion, endorsed by the Supreme Court,[128] the propriety of removal depends on whether the allegations of fact in a plaintiff's complaint could have stated a federal legal claim.[129] This approach, however, deprives the plaintiff of his or her traditional power to choose a state or federal forum in which to bring suit. If *Federated Department Stores* is construed broadly, whenever a defendant can find a federal law or constitutional right that arguably has been violated by the alleged actions in the plaintiff's complaint, the plaintiff's entire claim may be removable on federal question grounds.[130]

It is difficult to ascertain from the Supreme Court's disposition of *Federated Department Stores* the basis upon which the federal courts should determine whether the plaintiff's claim is "federal in nature." Neither the Ninth Circuit nor the Supreme Court offered a test or identified factors that help determine the "federal nature" of the plaintiff's claims.[131] The district court discussed the background of the claims filed by Moitie and Brown in reaching its decision, showing a concern with the plaintiffs' apparent attempt to evade the res judicata effect of the prior judgments, which were rendered when neither Brown nor Moitie contested the federal courts' jurisdiction.[132] Each of these factual circumstances was discussed by the district court before it reached its conclusion that a plaintiff could not engage in "artful pleading" to defeat removal.[133] The Supreme Court cited the district court's "extensive review and analysis of the origins and substance of the two Brown complaints" in upholding the district court's result.[134] This reliance on

127. See notes 96-107 & accompanying text *supra*.

128. 101 S. Ct. at 2427 n.2.

129. See notes 118-19 & accompanying text *supra*.

130. *See* Gayer v. Cuisinarts, Inc., No. 80-1675 (S.D. Cal. Feb. 27, 1981), *discussed in* note 124 *supra*.

131. Justice Brennan dissented in *Federated Department Stores* and criticized the majority's failure to provide a standard on which the lower courts could determine whether a claim was "federal in nature": "I do not understand what the Court means by this. *Which* of the claims are federal in character? *Why* are the claims federal in character?" 101 S. Ct. at 2433 (emphasis in original). Justice Brennan concluded that, absent an alleged reliance by the plaintiffs on a federal remedy under the Clayton Act, "the mere fact that plaintiffs might have chosen to proceed under the Clayton Act surely does not suffice to transmute their state into federal claims." *Id.*

132. Moitie v. Federated Dep't Stores, No. C-77-0576, slip. op. at 5-6 (N.D. Cal. July 6, 1977).

133. *Id.*

134. 101 S. Ct. at 2427 n.2. By the time of argument in the Supreme Court, Moitie had dismissed his appeal. *Id.* at 2426 n.1. Therefore, the remand at issue in the Supreme Court case involved only Brown's action, which had been filed first in federal court, dismissed, and then refiled in state court. *Id.* at 2426.

the origins and substance of the two complaints filed by plaintiff Brown—the first complaint filed in federal court relying on the Sherman Act, and the second complaint filed in state court relying on state law—suggests that the Supreme Court found significant the plaintiff's attempt to use "artful pleading" to evade the res judicata effect of a federal judgment that had been rendered in a federal forum chosen by the plaintiff.[135]

Until *Federated Department Stores*, the federal courts' concern with the use of "artful pleading" to avoid removal generally had been limited to cases in which the federal court found either that the state law relied upon by the plaintiff was preempted by a federal law or that the state law provided no relief, but federal law would do so.[136] The Supreme Court's reliance on the "artful pleading" doctrine to allow

135. In Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566 (N.D. Cal. 1981), the court attempted to reconcile *Federated Department Stores* with traditional removal law by explaining that "artful pleading" is an exception when "plaintiff seeks to conceal the federal nature of his claim by fraud or obfuscation." *Id.* at 572. The court noted that the well established application of "artful pleading" analysis involved preemption. *Id.* at 574-75. In the context of antitrust claims filed in state court, *Salveson* identified two situations in which "artful pleading" might be found. The first is when state law provides no relief. *Id.* at 576-77. See note 136 *infra*. The second situation involves circumstances such as those in *Federated Department Stores*, which the court explained as turning on Brown's prior consent to federal jurisdiction by filing suit in federal court. This prior suit established the defendant's "right" to a federal forum. *Id.* at 575. The court applied *Federated Department Stores* to support removal in *Salveson*, because the plaintiff previously had filed a federal suit involving the same subject matter, which had been dismissed with prejudice. *Id.* at 577-78. After refusing to remand on the authority of *Federated Department Stores*, the court dismissed the antitrust claims on the basis of derivative jurisdiction. It then retained jurisdiction of the pendent common law causes of action and dismissed them by applying res judicata. *Id.* at 580-83. *But cf.* Bancohio Corp. v. Fox, 516 F.2d 29, 32 (6th Cir. 1975) (refusing to take pendent jurisdiction over common law claims pled along with an action that was barred by doctrine of derivative jurisdiction). *Salveson* limits *Federated Department Stores* by allowing removal only when a plaintiff has previously filed suit in federal court. Dicta, however, suggests that any plaintiffs who remain members of a federal antitrust class have accepted the federal character of their antitrust claims. *Id.* at 576. Thus, an indirect purchaser's inclusion in a federal class of direct purchasers may act to provide a basis for removal. Such reasoning could provide the basis for removal of indirect purchaser actions when the class representatives also have made direct purchases and therefore are also members of federal classes. This dicta has been advanced to support removal. *See* Memorandum in Support of Defendant's Motion to Reconsider Order on Motion to Remand, at 4-5, Pate v. Boise Cascade Corp., No. C-81-2732 (N.D. Cal. filed Nov. 2, 1981).

136. See notes 104-06 & accompanying text *supra*. The cases cited by the Supreme Court to support denial of remand in *Federated Department Stores* on the ground of "artful pleading" were three district court opinions in which the state law relied upon by the plaintiffs was either preempted by federal law, Prospect Dairy Co. v. Dellwood Dairy Co., 237 F. Supp. 176 (N.D.N.Y. 1964), or did not allow recovery for the plaintiffs' cause of action. *In re* Wiring Device Antitrust Litigation, 498 F. Supp. 79 (E.D.N.Y. 1980); Three J Farms v. Alton Box Board Co., 1979-1 Trade Cas. (CCH) ¶ 62,423 (D.S.C. 1979), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980). Both *Wiring Device* and *Three J Farms* involved applications of South Carolina's antitrust statute, which South

removal in *Federated Department Stores* seems misplaced because the Cartwright Act never has been held to be preempted[137] and the Court did not suggest that it was preempted.[138]

The "Federal-in-Nature" Requirement as a Factual Question

A second major question left unanswered by the Court's decision

Carolina courts had held inapplicable to alleged antitrust violations involving interstate commerce. State v. Virginia-Carolina Chem. Co., 71 S.C. 544, 51 S.E. 455 (1905).

Several other states similarly limit their antitrust statutes. *See, e.g.*, Kosuga v. Kelly, 257 F.2d 48, 55 (7th Cir. 1958), *aff'd on other grounds*, 358 U.S. 516 (1958) (construing Illinois law); Cessna Finance Corp. v. White Industries, 1976-2 Trade Cas. (CCH) ¶ 61,105 (W.D. Mo. 1976) (construing Missouri law); Belton Elec. Corp. v. Selbst, 1977-2 Trade Cas. (CCH) ¶ 61,586, (Sup. Ct. N.Y. County, 1977), *aff'd mem.*, 61 App. Div. 2d 966, 403 N.Y.S.2d 1019 (1978) (New York); Young v. Seaway Pipeline, 576 P.2d 1148, 1151 (Okla. 1977) (Oklahoma). California, on the other hand, does not limit the application of its antitrust statutes to wholly intrastate activities. *See* Younger v. Jensen, 26 Cal. 3d 397, 405, 605 P.2d 813, 818, 161 Cal. Rptr. 905, 910 (1980); R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (1974).

In cases in which state antitrust statutes do not provide a remedy, the doctrine of derivative jurisdiction would seem to compel the federal court to dismiss the action. See notes 145-48 & accompanying text *infra*. Furthermore, preemption is generally held to be an affirmative defense. *See, e.g.*, Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 660 (9th Cir. 1972). The existence of an affirmative defense that gives rise to a federal question will not support removal jurisdiction. *Id.*; *see* Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 663 (1961); Gully v. First Nat'l Bank, 299 U.S. 109 (1936); Louisville Ry. v. Mottley, 211 U.S. 149 (1908); *Ex parte* Wisner, 203 U.S. 458 (1906). Thus, the soundness of allowing removal in the event of preempted state law is doubtful.

137. *See* 101 S. Ct. at 2433 (Brennan, J., dissenting); R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (1974); Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 A.B.A. ANTITRUST SECTION REPORTS 358, 361-68 (1962); *cf.* Connecticut v. Levi Strauss & Co., 471 F. Supp. 363 (D. Conn. 1979) (Connecticut antitrust statute not preempted). *See generally* J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 56-108 (1964) [hereinafter cited as FLYNN]; Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 668-70 (1974); Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961). Although the Supreme Court never has ruled directly on preemption of state antitrust laws, it has accepted state antitrust regulation without direct preemption analysis. *See, e.g.*, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Watson v. Buck, 313 U.S. 387 (1941); International Harvester Co. v. Missouri, 234 U.S. 199 (1914); Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912); Straus v. American Publisher's Ass'n, 321 U.S. 222 (1913); German Alliance Ins. Co. v. Hale, 219 U.S. 307 (1911); Standard Oil Co. v. Tennessee, 217 U.S. 413 (1910). For a discussion of preemption arguments in the wake of *Illinois Brick*, see notes 159-206 & accompanying text *infra*.

138. Justice Brennan agreed with the majority that a plaintiff should not be allowed to avoid federal jurisdiction when his or her state law claim had been preempted by federal law, but noted that these circumstances were not present in *Federated Department Stores* because the Cartwright Act had not been preempted. 101 S. Ct. at 2433 (Brennan, J., dissenting). Justice Brennan concluded that "[a]rtful or not, respondent's complaint was not based on any claim of a federal right or immunity, and was not, therefore, removable." *Id.* at 2433.

in *Federated Department Stores* is the effect of labeling as "factual" the district court's finding that the plaintiffs' claims presented federal questions rather than a state claim. Justice Brennan, in his dissenting opinion, noted that the district court had treated its conclusion that the plaintiff's claims were "federal in nature" as a legal conclusion.[139] He further reasoned that, "[i]n any event, a court's conclusion concerning the legal character of a complaint can hardly be considered a 'factual finding.' "[140]

Calling this recharacterization of the plaintiff's complaint a factual conclusion raises a number of questions.[141] The Court's failure to address the issues can only serve to inject further confusion into the removal and remand procedure.[142] As the amount of litigation brought by indirect purchaser classes in the state courts is increasing,[143] and as removal of such suits to federal court may well result in dismissal of such claims for failure to meet the requirements of Rule 23,[144] the courts should more clearly define the circumstances under which a plaintiff's state law claim presents a federal question, making the claim removable.

Derivative Jurisdiction

None of the opinions in the *Federated Department Stores* litigation discussed the application of the doctrine of derivative jurisdiction. The derivative jurisdiction doctrine requires that, upon removal of an action to federal court, the court assumes jurisdiction only if the state court had had jurisdiction of the action.[145] Accordingly, if an action is filed in state court over which the state court does not have jurisdiction, the action cannot be maintained in federal court upon removal because the federal court takes the action subject to any jurisdictional infirmities that existed in the state court.

The decision in *Federated Department Stores* seems erroneous. If,

139. *Id.* at 2433 n.5.

140. *Id.*

141. These questions include: Does this open the remand hearing to evidence concerning the true nature of the claim or is the hearing still limited to the face of the plaintiff's complaint? Which facts are important in the determination of the nature of the claim? Does the plaintiff's mere ability to state a cause of action under federal law support a finding that a federal claim exists? Perhaps most importantly, is the scope of appellate review limited to the strict scope usually applied to review of factual determinations?

142. See note 124 *supra*.

143. See note 3 *supra*.

144. See notes 84-85 & accompanying text *supra*.

145. "If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none [upon removal], although it might in a like suit brought there have had jurisdiction." Lambert Run Coal Co. v. Baltimore & O. R.R., 258 U.S. 377, 382 (1922); *see also* Freeman v. Bee Machine Co., 319 U.S. 448 (1943); General Inv. Co. v. Lakeshore & Michigan Southern Ry., 260 U.S. 261, 288 (1922).

by stating that the action was "federal in nature,"[146] the court meant that it was a federal antitrust claim, then the state court did not have original jurisdiction. Jurisdiction over Sherman Act claims is exclusively federal, and state courts therefore have no jurisdiction over such claims.[147] Thus, it seems that, if the plaintiffs' claims in *Federated Department Stores* are found to be based on the Sherman Act, and the state courts have no jurisdiction over Sherman Act claims, the federal court would have no jurisdiction over the claims once they were removed to the federal court. In light of the principles of derivative jurisdiction, it would seem that *Federated Department Stores* either should have been dismissed for lack of jurisdiction or remanded to the state courts.[148]

If the Supreme Court allows the federal courts to characterize plaintiffs' state law claims as Sherman Act claims, thereby allowing removal, and applies derivative jurisdiction, direct purchaser plaintiffs may be left with no remedy under the state antitrust laws. In short, if a direct purchaser files an antitrust claim in state court, the claim may be removed to federal court and dismissed. Only if a plaintiff files in federal court can he or she be guaranteed of maintaining an antitrust action, but then the consumer class may not be certifiable or otherwise maintainable because of the strict requirements of Rule 23.

Limiting Federated Department Stores

This apparent deprivation of the plaintiff's right to choose a state

146. 101 S. Ct. at 2427 n.2.

147. *See* Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 440 (1920); 15 U.S.C. § 15 (1976).

148. In Washington v. American League of Professional Baseball Clubs, 460 F.2d 654 (9th Cir. 1972), the court applied the doctrine of derivative jurisdiction to support its remand of an antitrust case that defendants contended was "federal in nature." In *Baseball*, the court refused to take a position on "looking behind" the plaintiff's alleged reliance on state law. *Id.* at 658. The court found that, even if it properly could recharacterize the plaintiff's complaint, the doctrine of derivative jurisdiction would require it to dismiss any cause of action that it found was a "disguised" federal antitrust claim. *Id.* Remaining state claims should be remanded because the federal court was not "allowed to proceed with the federal claims giving rise to its removal jurisdiction." *Id.* at 659. The state and federal claims were inexorably intertwined—the only practical way to remand them was "to remand the whole action." *Id.* If any claim was truly a federal antitrust cause of action, the state court would be required to dismiss it. The court refused to entertain preemption analysis because it was a state-court defense. *Id.*; *see also* Hughes Const. Co. v. Rheem Mfg. Co., 487 F. Supp. 345, 347 n.3 (N.D. Miss. 1980) (applying doctrine of derivative jurisdiction against removal of state antitrust action on federal question grounds). In Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566 (N.D. Cal. 1981), the court did apply derivative jurisdiction after determining that the state law claim was a federal antitrust claim, and dismissed the claim. *Id.* at 578-80. The court was able to reach the same result as the Supreme Court in *Federated Department Stores* because it retained jurisdiction over all other claims in the plaintiff's complaint and dismissed them under the doctrine of res judicata. *Id.* at 580-83.

forum when he or she has available a viable state remedy would be a serious usurpation of remedies traditionally afforded to plaintiffs. As noted by Justice Brennan, dissenting in *Federated Department Stores*, the remand procedures are "well grounded in principles of federalism."[149] According to Justice Brennan, the basic power retained by the states to regulate concurrently absent federal preemption should be maintained to prevent doing "violence to state autonomy."[150] As long as the state law relied upon is not preempted, the federal court's deference to the state court's duty to enforce state laws argues for remand of a plaintiff's state law antitrust claims.

The federalism argument is even stronger when analyzed in light of the outcome determinative nature of removal to federal court for many consumer class action suits. Not only does the danger exist that the federal court will unduly encroach on the autonomy of state courts, but a greater threat of injustice is present because a federal court accepting jurisdiction over a direct purchaser class action after removal may be forced by the strict requirements of Rule 23 to dismiss the action. Thus, it would be unfair to the class of direct purchasers for the federal court to take jurisdiction over a claim that it is unable to administer. To allow removal on the grounds that a federal question could have been stated by plaintiffs and then to dismiss the action for failure to meet federal class action criteria would infringe on traditional autonomy of the state courts.

Allowing the lower courts to make an unguided factual determination that Cartwright Act claims are "federal in nature" invites inconsistent results, and could affect the right of direct purchasers to sue in California state courts.[151] Therefore, courts should narrowly apply *Federated Department Stores* and limit its application to its facts. The case may best be understood as a specific aspect of "looking behind" a plaintiff's state law claims when the claims are preempted. A federal court may overlook the plaintiff's express reliance on state law in determining that the claim really presents a federal question, if state law provides no relief. In *Federated Department Stores*, the court seemed to extend this preemption exception to cases in which plaintiffs have no viable state law claim because they previously have received an adverse judgment with potential res judicata effect in a suit that they filed previously in federal court. The effect of the finding that res judicata bars relitigation of plaintiffs' claims in state court is similar to a decision that state law is preempted. The state law relied upon cannot apply to plaintiffs' claims, because of either the conclusive operation of a federal law or a federal judicial determination in a suit that the plaintiffs initi-

149. 101 S. Ct. at 2432.

150. *Id.*

151. See note 124 *supra*.

ated.[152] In both instances, the plaintiffs do not have a viable state claim. Using the possibility of a res judicata effect to assert jurisdiction upon removal, however, leaves many issues unaddressed.[153] Nonetheless, *Federated Department Stores* could be limited to allowing removal only when the same plaintiffs have previously filed an action in federal court, which has been dismissed by a judgment with res judicata effect. Without such a limiting interpretation, the operation of the removal procedure and derivative jurisdiction will have to be reexamined and reconciled with *Federated Department Stores*. This case should not be construed to allow a defendant to remove a state antitrust action to federal court merely because the plaintiff could have asserted a federal claim.

Indirect Purchasers—Saved by Sugar

Although a broad application of *Federated Department Stores* may result in the loss of the right of direct purchasers to sue in California state courts, indirect purchasers can still pursue state court actions under California antitrust laws. In *In re Sugar Antitrust Litigation*,[154] the Ninth Circuit held that an indirect purchasers' antitrust action must be remanded to state court when the defendant seeks removal.

The court noted that *Illinois Brick* prevented indirect purchasers from recovering under federal antitrust laws.[155] Without a basis for relief under federal law, the court reasoned that there could be no federal action.[156] The court found itself "squarely faced with claims asserted under California antitrust laws on facts that do not state a federal claim,"[157] and did not reach the issue of whether it could properly "look behind" the plaintiff's reliance on state law. *Sugar* indicates that, at least in the Ninth Circuit,[158] federal courts will not allow the

152. In Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566 (N.D. Cal. 1981), this new development in removal law was related to the principle that defects in the federal court's removal jurisdiction are waivable. The court reasoned that the plaintiff's consent to removal jurisdiction was manifested in *Federated Department Stores* by the plaintiff's prior suit in federal court. *Id.* at 575-76.

153. For example, a decision that the federal court has jurisdiction as a result of removal on the basis of res judicata does not address the difficulties in the operation of the derivative jurisdiction doctrine. See notes 145-48 & accompanying text *supra*. In addition, assertion of the *defense* of res judicata as a basis of federal jurisdiction is contrary to the principle that affirmative defenses cannot supply federal question jurisdiction. See note 136 *supra*.

154. 588 F.2d 1270 (9th Cir. 1978).

155. *Id.* at 1273.

156. *Id.*

157. *Id.* at 1272.

158. *Cf. In re* Wiring Device Antitrust Litigation, 498 F. Supp. 79 (E.D.N.Y. 1980) (removal on federal question and diversity grounds proper; action dismissed because *Illinois Brick* precludes recovery by indirect purchasers).

removal of actions brought by indirect purchasers under state antitrust laws.

Multiple Penalties and Preemption of the Indirect Purchaser's Cartwright Act Remedy

The prevailing interpretations of the Sherman Act and the Cartwright Act present the possibility that an antitrust defendant may be required to pay overlapping treble damages to direct and indirect purchasers in federal and state courts for the same anticompetitive acts. Although no court has yet been presented with a case giving rise to an imminent overlapping penalty, the penalty provisions of the two laws may permit this possibility. Under the Sherman Act, the direct purchaser is entitled to recover the entire overcharge attributable to an antitrust violation, even if that direct purchaser passed on the overcharge to indirect purchasers.[159] Under the Cartwright Act, the indirect purchaser is entitled to prove that he or she in fact suffered the overcharge that the direct purchaser passed on and to recover those damages.[160] Thus, the indirect purchaser's recovery against an antitrust violator under the Cartwright Act may constitute a portion of the overcharge for which the direct purchaser recovered treble damages under the Sherman Act.

The danger of multiple penalties is probably not present in parallel class action suits filed by direct purchasers who bring suit in both state court and federal court.[161] It is unlikely that a class of direct purchaser consumers would be certified to litigate the claim in federal court.[162] Even if such a consumer class was certified and litigated its claim to final judgment, the final judgment should bar a subsequent state action by an identical class of direct purchasers. Class action judgments meeting due process requirements are binding on all members of the class.[163] Furthermore, a final judgment is conclusive on all claims actually litigated and all claims that could have been litigated

159. See notes 6-21 & accompanying text *supra*.

160. See note 22 & accompanying text *supra*. *See generally* Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the Illinois Brick Wall*, 34 STAN. L. REV. 203, 205-08 (1981).

161. Direct purchaser consumers often may choose to litigate antitrust claims in California courts because of the state court's more flexible class action procedures. If *Federated Department Stores* is extended to permit removal of direct purchaser actions as it has been in the Southern District of California, see note 124 *supra*, they will not have the choice to proceed in state court.

162. See note 24-81 & accompanying text *supra*.

163. FED. R. CIV. P. 23(c)(3); Advisory Committee's Note to Proposed Rule 23, 39 F.R.D. 98, 105 (1966); *see also* Alexander v. Aero Lodge No. 735, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

between the parties.[164] Thus, a judgment in a class action suit filed in federal court by a class of direct purchasers that included California direct purchasers would be binding on any class of California direct purchasers who subsequently filed suit in California court, because the direct purchasers' Cartwright Act claim could have been brought in federal court as pendent to the Sherman Act claim.[165]

Res judicata, however, would not bar a subsequent suit in state court by indirect purchasers. A class of direct purchasers that received a federal court judgment probably would not have an identity of interest with a class of indirect purchasers. Because res judicata cannot bar an action by a plaintiff who has not had an opportunity to be heard in court either individually or as a member of a class,[166] a judgment obtained by a class of direct purchasers probably would not bar a subse-

164. *See, e.g.*, Engelhardt v. Bell & Howell Co., 327 F.2d 30, 32 (8th Cir. 1964); Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464, 469-70 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); F.L. Mendez & Co. v. General Motors Corp., 161 F.2d 695 (7th Cir. 1947); Ford Motor Co. v. Superior Court, 35 Cal. App. 3d 676, 110 Cal. Rptr. 59 (1973).

165. *See* Engelhardt v. Bell & Howell Co., 327 F.2d 30, 32-33 (8th Cir. 1964); Ford Motor Co. v. Superior Court, 35 Cal. App. 3d 676, 110 Cal. Rptr. 59 (1973). The rule that a judgment is binding on all claims that could have been raised gives rise to numerous issues when plaintiffs may be both direct and indirect purchasers. There may be serious questions about the binding effect of a judgment entered adjudicating indirect purchasers' rights in federal court when their interests seriously conflict with the interests of direct purchasers. A challenge to the adequacy of representation may form the basis of a collateral attack on the prior class action judgment. *See* Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961); Hansberry v. Lee, 311 U.S. 32 (1940); Fowler v. Birmingham News Co., 608 F.2d 1055 (5th Cir. 1979). *See generally* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974); Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions under Federal Rule 23*, 123 U. PA. L. REV. 1217 (1975). In addition, some Cartwright Act claims arguably cannot be brought as pendent claims in federal court and thus cannot be barred because they could have been litigated together with direct purchaser claims in federal court. Pendent jurisdiction may be exercised by the federal courts when "state and federal claims . . . derive from a common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). A Cartwright Act claim involving the same price-fixing conspiracy would seem to be a proper pendent claim to a Sherman Act claim. The exercise of pendent jurisdiction is discretionary, however, to be exercised within "considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726. The *Illinois Brick* decision essentially rested on a conclusion that litigating indirect purchaser claims in federal court was contrary to federal judicial economy. See notes 7-21 & accompanying text *supra*. Furthermore, the great possibility of jury confusion in these antitrust claims weighs against the exercise of pendent jurisdiction. United Mine Workers v. Gibbs, 383 U.S. at 727. Finally, the exercise of pendent jurisdiction could require the federal court to rule on issues of federal preemption of state law, a further consideration weighing against the exercise of pendent jurisdiction. *Id.* Thus, the federal courts arguably should refuse to exercise pendent jurisdiction over indirect purchaser Cartwright Act claims. It would be inequitable to bar such a claim in state court when it could not have been brought in the federal action.

166. *See* Schrader v. Selective Serv. Sys. Local Bd., 329 F. Supp. 966 (D. Wis. 1971); FED. R. CIV. P. 23(c)(3).

quent action by indirect purchasers.[167]

Therefore, the problem of multiple penalties against the same antitrust defendant generally is limited to situations in which an antitrust defendant may be compelled to pay damages to both direct and indirect purchasers. The divergence between the two antitrust statutes regarding the indirect purchasers' remedy may constitute a conflict between those laws that give rise to the possibility that the Cartwright Act's indirect purchaser remedy is preempted by the Sherman Act.[168]

Preemption

The doctrine of preemption holds that in certain instances state laws are overridden by federal laws or regulations by operation of the supremacy clause of the United States Constitution.[169] Preemption problems arise because state and federal legislatures possess concurrent jurisdiction to regulate many subjects.[170] States retain the powers to

167. However, if a class member is both a direct and an indirect purchaser, other problems may arise. See note 165 *supra*.

168. Commentators who, in the past, have argued that state antitrust statutes are not preempted generally have reserved their conclusions if a multiple penalty was involved. *See, e.g.*, FLYNN, *supra* note 137, at 156-57; Barnett, *Problems of Compliance—Conflicts in State and Federal Antitrust Enforcement*, 29 ABA ANTITRUST L.J. 285, 285 n.2 (1965); Dillon, *But the Other Referee Said!—A Criticism of Multiple Litigation in Identical Bidding and Merger Cases*, 39 TEX. L. REV. 782, 804-07 (1961); Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEX. L. REV. 753, 757 (1961); Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 685 (1974). *But see* State v. Southeast Tex. Chapter of Nat'l Elec. Contractor's Ass'n, 358 S.W.2d 711 (Tex. Civ. App. 1962) (Department of Justice, as *amici curiae*, argued that double prosecutions should not compel finding of preemption), *cert. denied*, 372 U.S. 969 (1963). Since the apparent contrast between California and federal law in the wake of *Illinois Brick*, both the courts, *see* Connecticut v. Levi Strauss & Co., 471 F. Supp. 363 (D. Conn. 1979), and commentators have raised the preemption issue. *See generally* Note, *Indirect Purchaser Suites Under State Antitrust Laws: A Detour Around the Illinois Brick Wall*, 34 STAN. L. REV. 203, 211-18 (1981) (finding no preemption of an indirect purchaser state law remedy after *Illinois Brick*).

The need to defend antitrust suits in both state and federal courts together with the possibility that multiple penalties may be incurred also has given rise to an argument that the Cartwright Act constitutes an unconstitutional burden on interstate commerce. *See* Connecticut v. Levi Strauss & Co., 471 F. Supp. 363, 368 (D. Conn. 1979). The burden-on-commerce argument is unpersuasive. In *Levi Strauss*, the court stressed that the "Commerce Clause protects the interstate market, not particular interstate firms," *id.* at 368 (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-28 (1981)), and stated, "uniformly applied prohibitions of price-fixing would not seem to inhibit the flow of goods between states." *Id.*

169. U.S. CONST. art. VI, § 2; *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 376 (1978).

170. *See* California v. Zook, 336 U.S. 725, 728-29 (1949); R.E. Spriggs & Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 658, 112 Cal. Rptr. 585, 588 (1974); FLYNN, *supra* note 137, at 56-108. *See generally* 1 P. AREEDA & D. TURNER, ANTITRUST LAW 58 (1978); Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 667-73 (1974); Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961); Note, *The*

regulate certain activities affecting interstate commerce that the federal government also regulates under the commerce clause.[171] The federal power, if exercised, can be plenary; Congress can expressly preempt state laws that purport to regulate in an area regulated by the federal law.[172] A problem arises, however, when Congress does not explicitly preempt state law, because the courts then must decide whether the state law is implicitly preempted by federal legislation. In general, the courts inquire whether the state legislation conflicts with federal law to such a degree that the state and federal laws cannot concurrently be enforced without impairing the purpose and manner of federal regulation.[173]

Whether a conflict sufficient to infer preemption exists between state and federal regulation is analyzed on a case-by-case basis; a clear test is difficult to elicit from the cases.[174] Deciding whether a state statute conflicts with a federal statute requires a two-step analysis. First, the two statutes must be construed.[175] A federal court usually defers to a state court's interpretation of the state law.[176] After construing the two statutes, the court ascertains whether the state law interferes with the federal law or the furtherance of important federal policies.[177] The finding of such an interference or conflict is "disfavored" because under the federalist system states may regulate to further state interests.[178] The Supreme Court has indicated that conflicts must be real and concrete, not hypothetical: "[T]he teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists."[179]

At least two arguments suggest that the Cartwright Act's provision for indirect purchaser treble damages remedy conflicts with basic federal antitrust policy and therefore is preempted.[180] First, it may be ar-

California Legislature Steers the Antitrust Cart Right Off the Illinois Brick Road, 11 PAC. L.J. 121 (1978).

171. U.S. CONST. art. II, § 8, cl. 3. *See generally* FLYNN, *supra* note 137, at 56-108.

172. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31, 233 (1947).

173. *See, e.g.*, Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1962). *See generally* FLYNN, *supra* note 137, at 1-19; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 378-79 (1978).

174. *See* City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 638 (1973).

175. *See* Perez v. Campbell, 402 U.S. 637, 644 (1971).

176. *See* DeCanas v. Bica, 424 U.S. 351, 363-65 (1976); *see also* Allen-Bradley Local No. 1111 v. Wisconsin Board, 315 U.S. 740, 746 (1942).

177. *See, e.g.*, Perez v. Campbell, 402 U.S. 637, 649-56 (1971).

178. *See, e.g.*, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978); DeCanas v. Bica, 424 U.S. 351, 357 n.5 (1976); Smith v. Ware, 414 U.S. 117, 127 (1973); Goldstein v. California, 412 U.S. 546 (1973). *See generally* FLYNN, *supra* note 137, at 1-19.

179. Huron Cement Co. v. Detroit, 362 U.S. 440, 446 (1960); *see also* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 130-31 (1978); Seagram & Sons v. Hostetter, 384 U.S. 35, 45-46 (1966).

180. Most commentators have said that state antitrust laws, such as the Cartwright Act,

gued that the *Illinois Brick* rule barring indirect purchaser damage recoveries is an enunciation of a clear federal policy that only direct purchasers should recover for antitrust violations that occur in interstate commerce regardless of plaintiff rights under state law. A state's provision of an indirect purchaser's remedy would be a direct frustration of such a federal policy. Second, it may be argued that allowing multiple treble damages frustrates both a general policy against duplicative penalties and a specific antitrust policy against such remedies. This related argument maintains that, if the state law seems to permit a duplicative penalty, it frustrates basic antitrust policy against multiple penalties and thus is preempted.[181]

The argument that *Illinois Brick* states an important federal policy that only direct purchasers can recover damages for antitrust violations takes the holding of that case far beyond its stated rationale. The *Illinois Brick* Court's rationale focused on the need to facilitate federal antitrust suits and cited factors such as ease of judicial administration and avoidance of evidentiary burdens to support its decision.[182] Furthermore, the Court in *Illinois Brick* was influenced by the stare decisis effect of *Hanover Shoe* in reaching its decision.[183] Thus, as *Illinois Brick* was concerned with judicial economy and the stare decisis effect of prior interpretations of federal statutes, the case would not seem to bar a state legislature from determining that state courts are permitted to allow damages to indirect purchasers.

Several policies enunciated by the *Illinois Brick* Court, however, may be offended by indirect purchaser suits in state court. To allow indirect purchasers to sue in state court may lessen the incentive of direct purchasers to sue in federal court. The Court in *Illinois Brick* reasoned that allowing indirect purchasers to sue in federal courts would erode the efficacy of the private enforcement of the antitrust

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are not preempted. See note 137 *supra*. Several commentators, however, have reserved this conclusion in a situation in which multiple penalties may occur. See note 168 *supra*.

181. A third, related preemption argument is that the state suits are in conflict with the multidistrict litigation (MDL) statute, 28 U.S.C. § 1407 (1976), because state suits are immune to MDL transfer procedures unless they are removable to federal court. Accordingly, the federal policy favoring consolidation of litigation is frustrated by allowing state actions. *See* Three J Farms v. Alton Box Board Co., 1979-1 Trade Cas. (CCH) ¶ 62,423 at 76,550 (D.S.C. 1979), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980). This argument exceeds the scope of the MDL process. The statute is not an all-purpose consolidation vehicle, but operates within the normal jurisdictional guidelines of the federal courts without any necessary impact on the state's right to provide a forum for litigation. *See* Bancohio Corp. v. Fox, 516 F.2d 29, 32 (6th Cir. 1975). *See generally* Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575 (1978); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001 (1974).

182. *See* 431 U.S. at 737-43.

183. *See id.* at 736.

laws.[184] However, the mere possibility that this lessened incentive would result from concurrent state regulation seems too hypothetical to find a conflict justifying preemption. Thus, except for the possibility of multiple recoveries, discussed below, and the hypothetical possibility of a lessening of the deterrence power of private antitrust enforcement, the grounds for *Illinois Brick*'s rule barring indirect purchaser recoveries involved considerations limited to the operation of the federal courts in administering relief under federal statutes.

No compelling reason for extending the decision's rule to limit the operation of state antitrust laws can be elicited from the decision. The court's main concern was with the operation of the federal courts in administering relief under federal statutes. *Illinois Brick* may be interpreted to show that the federal courts prefer not to entertain the difficulties of litigating indirect purchaser actions. As this policy is not frustrated by California's decision to litigate those claims, the Cartwright Act should not be found preempted by *Illinois Brick*.

Illinois Brick arguably also establishes an affirmative right of defendants to be immune from antitrust damages actions by indirect purchasers. According to this argument, the Cartwright Act deprives the defendant of a federal right or immunity when it allows a suit by indirect purchasers. In *Exxon Corp. v. Governor of Maryland*,[185] however, the Supreme Court rejected a similar argument that an exemption to the Robinson-Patman Act[186] prevented a state from regulating price discrimination more rigorously than the federal exemption would have allowed. Thus, the Supreme Court refused to hold that Congress, by exempting certain behavior from federal regulations, intended to preempt state laws that regulated that behavior.[187] Applying this reasoning to the Cartwright Act, the indirect purchaser remedy should not be held preempted solely because federal law immunized defendants from suits brought by indirect purchasers under federal law. The fact that federal law protects defendants from damages actions by indirect purchasers under federal law does not necessarily mean that state laws allowing such a recovery are preempted.

A more persuasive argument for preemption is that an important federal policy against imposing multiple damages penalties is frustrated if a state judgment allowing recovery by indirect purchasers results in cumulative treble damages. There are indications that the Supreme Court disfavors multiple treble damages under the Sherman

184. *See id.* at 745-47.

185. 437 U.S. 117 (1978).

186. 15 U.S.C. §§ 13-13b, 21a (1976).

187. The Court explained: "[I]t is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to preempt the State's power to prohibit any conduct within that exclusion." 437 U.S. at 132.

Act.[188] The need to avoid multiple treble damages was one of the principal bases for *Illinois Brick*.[189] An important balance is struck in the antitrust laws between deterring violations and encouraging competition,[190] which may be upset by awarding damages in excess of treble damages.[191]

The Supreme Court has yet to address whether cumulative treble damages penalties would constitute a fundamental conflict between state and federal antitrust laws, which would preempt state law. However, in *Pennsylvania v. Nelson*,[192] in which the Court found that a state sedition statute was preempted, the Court commented: "Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment."[193] In contrast to this dictum is dictum from *California v. Zook*,[194] a case involving possible double punishment under legislation involving interstate commerce. In *Zook*, the Court refused to allow a threat of multiple punishment to be a persuasive indication of congressional intent to preempt concurrent state regulation.[195] Unlike *Nelson*, which involved se-

188. *See* Illinois Brick Co. v. Illinois, 431 U.S. at 730-31 & n.11; Hawaii v. Standard Oil Co., 405 U.S. 251, 263-64 (1972).

189. *See* 431 U.S. at 730-31.

190. *See* Mid-West Paper Products Co. v. Continental Group, 596 F.2d 573, 586-87 (3d Cir. 1979).

191. *Cf.* United States v. United States Gypsum Co., 438 U.S. 422, 441-42 (1978) (criminal sanctions only imposed for violations Congress has determined violate antitrust laws); Cromar Co. v. Nuclear Materials & Equipment Corp., 543 F.2d 501, 506 (3d Cir. 1976); (standing to sue for treble damages should be applied only when plaintiff is one "whose protection is the fundamental purpose of the antitrust laws;" too broad an interpretation might "result in an overkill . . . far exceeding that contemplated by Congress"); Jeffry v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975) (same); Calderone Enterprises v. United Artists Theatre Circuit, 454 F.2d 1292, 1295 (2d Cir. 1971) (same).

Recently, in Texas Industries v. Radcliff Materials, 451 U.S. 630 (1981), the Supreme Court held that the Sherman Act could not be interpreted to compel contribution among antitrust violators. *Id.* at 646-47. The lack of a right to contribution may result in individual defendants having to pay far greater than treble the injury flowing from their activities, and may result in crippling a violator to such an extent that it may never again be a viable competitor. Although the Court mentioned the policy against burdensome awards, *see id.* at 636-37, the policy had no bearing on the Court's determination of whether Congress intended to allow contribution. The policy against burdensome awards did not control in *Texas Industries*, and perhaps it would not control in the more rigorous context of preemption analysis.

192. 350 U.S. 497 (1956).

193. *Id.* at 509-10. The Court based its decision on three grounds. First, the federal regulations were found to be so pervasive that congressional intent to supplant state regulation was inferred. *Id.* at 502-03. Second, the state law needlessly legislated in an area of primary federal jurisdiction. *Id.* at 504. Third, enforcement of the state laws presented a serious danger of conflicting with the administration of the federal laws in an area in which uniformity of enforcement was required. *Id.* at 504-05.

194. 336 U.S. 725 (1949).

195. *Id.* at 737.

dition, however, *Zook* involved highway regulations, which is an area falling within the state's traditional police powers.[196]

It is difficult to reach conclusions from these two cases because neither decision rested on the Court's dictum regarding the danger of multiple penalties.[197] Furthermore, both involved criminal sanctions, while the sanctions involved in the antitrust laws are civil, despite their punitive qualities. Nonetheless, there is an arguable federal policy against the award of greater than treble damages for a single antitrust violation under the Sherman Act. This policy reflects a general federal goal of encouraging effective competition.[198] Thus, arguably a state's award of a cumulative treble damages penalty would be in conflict with basic federal antitrust policy and thus preempted.

The tentative conclusion that an actual cumulative treble damages award may be preempted differs from the proposition that the possibility of a cumulative treble damages award compels the immediate preemption of the Cartwright Act because of its indirect purchaser remedy. There is a strong presumption against premature findings of conflicts between state and federal law.[199] Hypothetical or speculative conflicts between state and federal law are insufficient to warrant preemption.[200]

The apparent danger of multiple treble damages penalties should be deemed too hypothetical to support a finding of preemption. The

196. *See id.* at 734-35.

197. The Court refused to find preemption in *Zook*, 336 U.S. at 737-38, and in *Nelson* its finding of preemption was based on other grounds. 350 U.S. at 502-05. The dicta in the two cases have been reconciled two ways. The first method of reconciliation is a result-oriented analysis that focuses on the difference in the penalties involved in the two cases—*Nelson*'s criminal sanctions were much more serious than those involved in *Zook*. Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 685 n.212 (1974); Note, *The Commerce Clause and State Antitrust Regulations*, 61 COLUM. L. REV. 1469, 1492 (1961). The second method of reconciliation, suggested by the Court's reasoning in *Nelson*, is that the state statute involved in *Nelson* sanctioned offenses against the same sovereign, the United States, as did the federal sedition statute. *See* 350 U.S. at 499-504. In *Zook*, the Court emphasized that the concept of offenses against separate sovereigns did not implicate constitutional consideration of double jeopardy and that the state's regulation of local effects of interstate commerce did not conflict with Congress' interstate regulation. 336 U.S. at 731. Application of the first reconciliation to a real award of multiple treble damages suggests that the Court may strike down the state law. The magnitude of multiple treble damages awards for a nationwide industry is staggering. The second method of reconciliation suggests that, because the two sovereigns are protecting separate parties and furthering similar but separate policies, the imposition of multiple damages awards would be permitted.

198. *See* Mid-West Paper Products Co. v. Continental Group, 596 F.2d 573, 586-87 (3d Cir. 1979).

199. *See* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 130-31 (1978); Seagram & Sons v. Hostetter, 384 U.S. 35, 45-46 (1966).

200. *See* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 130-31 (1978); Seagram & Sons v. Hostetter, 384 U.S. 35, 45-46 (1966); Huron Cement Co. v. Detroit, 362 U.S. 440, 446 (1960).

state courts and the federal courts could interpret their antitrust laws to prevent cumulative penalties. Federal courts typically defer to state courts for interpretation of the state laws,[201] thereby allowing the state court to interpret the state law to lessen or negate apparent conflict between the state and federal laws.[202]

The Cartwright Act and Sherman Act may be reconciled by the courts to prevent multiple damages awards. Both statutes traditionally have led to active judicial interpretation of their provisions in changing economic and judicial circumstances.[203] A reconciliation of the two statutes by the federal and state courts is possible. Moreover, the federal and California *parens patriae* statutes[204] indicate that the federal and state legislatures may be willing to provide for a set-off in a damages award to account for a prior judgment. Although these *parens patriae* statutes do not apply to actions by private plaintiffs,[205] they indicate that set-offs for prior awards against the same defendants may be possible. Thus, the possibility that the operation of two statutes can be reconciled to avoid multiple treble damages awards makes conflict between the two statutes merely hypothetical and unripe for a holding that the Cartwright Act is preempted.[206]

201. *See* DeCanas v. Bica, 424 U.S. 351, 363-65 (1976); Allen-Bradley Local No. 1111 v. Wisconsin Board, 315 U.S. 740, 747 (1942).

202. *See* DeCanas v. Bica, 424 U.S. 351, 363-65 (1976); Allen-Bradley Local No. 1111 v. Wisconsin Board, 315 U.S. 740, 748 (1942). Additionally, the majority of antitrust cases are settled before trial. *See* Furth & Burns, *The Anatomy of a Seventy Million Dollar Sherman Act Settlement—A Law Professor's Tape-Talk with Plaintiff's Trial Counsel*, 23 DEPAUL L. REV. 865, 880 (1974); Renfrew, *Negotiation and Judicial Scrutiny of Settlements in Civil and Criminal Antitrust Cases*, 70 F.R.D. 495, 495-96 (1976) (90% of private treble damages actions settled before trial in fiscal 1975). Thus, it is unlikely that cumulative treble damages will be awarded in many cases. Furthermore, it is possible that defendants who are subjected to actual duplicative penalties will be able to utilize theories of unjust enrichment or interpleader to prevent having to actually pay the overlapping penalties. *See generally* Note, *The Debate Over the Passing-On Concept in Antitrust Law: Is It Finally Settled?*, 15 HOUS. L. REV. 199, 211 (1977); Note, *Anti-Trust Law—Private Actions: The Supreme Court Bars Treble-Damage Suits by Indirect Purchasers*, 56 N.C.L. REV. 341, 350-51 (1978). As one federal court put it, "As before, defendants exagerate the threat they face. Double liability can result only if all plaintiffs prevail on the overlapping issues, and only if the state court plaintiffs further establish the presence of a 'pass on'. These are speculative dangers at best." *In re* Industrial Gas Litigation, No. 80-C-3479 slip. op. at 43 (N.D. Cal. Dec. 30, 1981) (Memorandum Opinion and Order Certifying Plaintiff's Class at 43).

203. *See* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 105, at 12-14 (1978).

204. The federal *parens patriae* statute provides that the court shall "exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly applicable to (i) natural persons who have excluded their claims . . . and (ii) any business entity." 15 U.S.C. § 15c(a)(1) (1976). The California *parens patriae* statute, contains identical language. CAL. BUS. & PROF. CODE § 16760(a)(1) (West Supp. 1981).

205. *See* 15 U.S.C. § 15c (1976); CAL. BUS. & PROF. CODE § 16760 (West Supp. 1981).

206. Even without a limiting construction of the statutes, the Cartwright Act could be

The hypothetical danger of multiple treble damages penalties does not mandate the conclusion that the Cartwright Act is preempted because of its remedy for indirect purchasers. Nonetheless, the Sherman Act is in tension with the Cartwright Act. How that tension will be resolved is unclear, but the teachings of the Supreme Court indicate that the proper resolution of that tension is not a finding of federal preemption at this stage of the Cartwright Act's development.

Conclusion

Basic differences between California and federal class action procedures and antitrust statutes illustrate that the California state courts are more receptive to antitrust consumer class actions than the federal courts. Differences between class action procedures favor consumer classes in the California courts. The substantive difference between the antitrust laws favor the indirect purchaser under the California Cartwright Act. Many consumer antitrust actions that can be maintained in California state courts could never be maintained in the federal courts.

The consumer antitrust action in California's courts is not without problems. Defendants usually seek to remove state court actions to federal court because of the defendants' desire to consolidate actions and the plaintiffs' difficulty in maintaining a class action in federal court. Indirect purchaser claims are not removable on grounds of federal question jurisdiction, but the status of direct purchaser claims is in serious doubt. Removal of direct purchaser claims could result in the dismissal of those claims by the federal court because of the inability of the consumer class to meet federal class action requirements.

For the indirect purchaser class that can escape removal, there remains unanswered the question whether the class can or should recover damages when a parallel federal action is litigated to a final judgment by direct purchasers. The Sherman Act and Cartwright Act seem to allow duplicative damages for the direct and indirect purchasers. An actual award of multiple damages may preempt the state law, but the current hypothetical danger of multiple penalties should not compel a finding of federal preemption.

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held preempted on a case-by-case basis only when an actual award of multiple penalties is imminent. *See* FLYNN, *supra* note 137, at 156-57.

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